

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

REMBRANDT WIRELESS
TECHNOLOGIES, LP

DOCKET NO. 2:13CV213

JANUARY 20, 2015

VS.

9:05 A.M.

SAMSUNG ELECTRONICS CO
LTD., ET AL

MARSHALL, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 187

REPORTER'S TRANSCRIPT OF PRETRIAL CONFERENCE

BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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DEFENDANTS' MOTIONS IN LIMINE

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1 (OPEN COURT, ALL PARTIES PRESENT.)

2 THE COURT: For the record, we're here this
3 morning for the pretrial conference in *Rembrandt versus*
4 *Samsung*, which is Case No. 2:13-213 on our docket.

09:05AM

5 Would counsel state their appearances for the
6 record.

7 MR. WARD: Good morning, your Honor.

8 THE COURT: Good morning, Mr. Ward.

09:05AM

9 MR. WARD: Johnny Ward, along with Eric Enger,
10 Amir Alavi, Demetrios Anaipakos, and Mike Heim with me at
11 counsel table; Jamie Aycock, Blaine Larson, Alisa Lipski,
12 Kyril Talanov, and Andrea Caswell who is our legal
13 assistant with the AZA firm and she's going to be helping
14 us with computer graphics this morning.

09:06AM

15 THE COURT: Very good. Thank you, Mr. Ward.
16 Good morning, Mr. Smith.

09:06AM

17 MR. SMITH: Thank you, your Honor. For
18 Samsung, Michael Smith; and with me at counsel table is
19 Gabrielle Higgins, Jesse Jenner, Jeff Sherwood, Gerry
20 Haddad; and then in the first row, Ms. Rebecca Hermes and
21 Jennifer BianRosa. We are ready to proceed.

22 Oh, and also we have our director of
23 litigation Ms. Michelle Yang in the gallery. And we are
24 ready to proceed, your Honor.

09:06AM

25 THE COURT: Very well. Thank you, Mr. Smith.

1 Let me start off with just the logistical
2 items. This case is the first case up on the February 9
3 trial docket for Judge Gilstrap. There are other cases
4 on that docket; but this is the case that is set first.
5 So, you can count on that.

09:06AM

6 Jury selection will start that morning. Voir
7 dire is currently at 40 minutes per side, I think is what
8 Judge Gilstrap is going with at this time. I think that
9 local counsel on both sides are familiar with the -- with
10 Judge Gilstrap's requirements for voir dire; but I'll
11 just repeat that his practice is that the parties can use
12 the first three minutes or so for background and case
13 introduction purposes. The rest of it should be
14 specifically questioning the jury panel -- in other
15 words, trying to elicit the jury's feelings and
16 experience on matters -- rather than arguing the case to
17 the jury. And he does occasionally cut people off who
18 wander into argument. So, counsel should bear that in
19 mind.

09:07AM

20 He will allow four peremptory strikes and seat
21 a jury of eight jurors. The jury will be presented with
22 jury notebooks once they're seated and will -- I'll get
23 Mr. Walter to send you out an e-mail with more details.
24 I think that the practice on that is well familiar to
25 local counsel as far as what the contents of those jury

09:08AM

09:08AM

1 notebooks should be, but obviously the patents at issue
2 and the court's claim construction chart.

3 If you have stipulations -- I don't recall
4 there being any material stipulations in the pretrial
09:09AM 5 order in this case. If there are any stipulations that
6 you want to present to the jury, then I think the favored
7 way to do that would be by a stipulation that can be
8 included in the jury notebook as opposed to reading those
9 to the jury.

09:09AM 10 And obviously, then, the -- one of the most
11 important features is a witness page for each witness
12 that you'll call to the trial; and that would also
13 include witnesses whose testimony will be presented by
14 deposition, the idea being that there will be a page that
09:09AM 15 the jurors can take notes on that will have the photo of
16 the witness and help them remember during deliberation
17 exactly who that witness was and thereby help them
18 remember, when the parties disagree about what the
19 witnesses said. They'll be in a better position to

09:10AM 20 evaluate the arguments on those things. So, that's an
21 important feature that there be such a page for each
22 witness in the book. Typically those are provided at the
23 time the notebooks are delivered before the trial starts.
24 There are occasions when you're not able to get the photo
09:10AM 25 of a witness before the trial starts; and, so, those can

1 be supplemented, as long as the jury gets them before the
2 testimony begins.

3 I think Judge Gilstrap's current practice is
4 to conduct the voir dire and swear the jury in and then
09:11AM 5 break for lunch. So, the lunch may be a little early or
6 a little late based on just when that completes; but the
7 evidence will start after lunch and typically the
8 openings after lunch as well.

9 I think you can plan on 30 to 35 minutes per
09:11AM 10 side for openings. Closings, the judge will give you
11 those during the trial. We'll confirm. If it's any
12 different, it will be in an e-mail that you'll get as far
13 as the length of the openings. But it will be in that
14 range, and we'll specify exactly what it is.

09:12AM 15 It's very important that Judge Gilstrap wants
16 to not keep the jury waiting during the time when they're
17 here. So, he will be available, starting at 7:30 each
18 day, to take up any contested matters before the jury
19 reports for service. We're going to go over a protocol
09:12AM 20 for you to meet and confer about any issues that come up
21 during the trial, and part of that -- an important part
22 of that protocol will be that you notify the judge's
23 office the evening before if you are going to need time
24 to take something up the next morning.

09:13AM 25 Breaking news on the length of the openings

1 and closings. 25 minutes for the openings, 35 minutes
2 for the closings. That's the latest information.

3 And I don't recall seeing an agreement of the
4 parties about that. Mr. Ward and Mr. Smith, have you
09:13AM 5 discussed that? Do you have any agreements on how you're
6 going to notify each other about the order of witnesses
7 and the exhibits or demonstratives that will be used?

8 MR. WARD: We have not discussed that, your
9 Honor. We'll do that. I don't think that will be a
09:14AM 10 problem. It's fairly pretty standard. What's the
11 court's deadline for when he wants to be notified? Is it
12 9:00 o'clock? Is it 8:00 o'clock? Or is there a
13 deadline?

14 THE COURT: I mean, it's usually by agreement,
09:14AM 15 frankly; but I would think that -- I mean, what we're
16 asking now is that you notify the law clerk -- in this
17 case Mr. Walter -- about any disputes the evening before;
18 and, you know, if you have particular constraints that
19 set a particular time -- typically it's, you know, by
09:14AM 20 10:00 p.m.; but I don't -- we can vary that. If there's
21 a need to be able to contact somebody somewhere and
22 they're not available until later, I mean, that's
23 something that can be worked out.

24 MR. WARD: Okay.

09:15AM 25 THE COURT: The hope is that y'all can make an

1 agreement that satisfies your needs. I mean, as a
2 default, I would -- in terms of the order of witnesses, I
3 would typically say if you don't agree on something
4 different, then you should notify the other side by the
5 end of the trial day who you're going to call. But if
6 you want to agree on 6:00 or 7:00 or some later time,
7 that's fine.

09:15AM

8 MR. WARD: Certainly.

9 THE COURT: And I don't know if you have a
10 need to -- or if you want to agree to disclose
11 demonstratives. That's something you can work in. Our
12 goal, you know, is just to make sure that if you've got a
13 dispute, that it gets aired before the jury is in the
14 box. And as long as the system you come up with avoids,
15 you know, disruption of the trial, then you won't have
16 any problem from us.

09:15AM

09:15AM

17 MR. SMITH: We'll get together on that, your
18 Honor, and see if we can come up with something by
19 agreement.

09:16AM

20 THE COURT: Okay. I would expect that we're
21 probably going to end up getting back together on
22 exhibits and deposition cuts. So, we can just make sure
23 this gets resolved by that date. However, you may
24 surprise me and be ready to take care of all those today,
25 but anyway.

09:16AM

1 MR. WARD: As usual, I think limines will
2 inform a lot of the exhibits, although there are some
3 categories that we might be able to get some guidance
4 from the court outside of the limines that we're ready to
5 take up on the exhibits, just to kind of give you a
6 heads-up.

09:16AM

7 THE COURT: Okay. One thing about witnesses
8 that is I think becoming well known to local counsel at
9 least, it's important that you instruct your team that
10 Judge Gilstrap expects the formality of the proceedings
11 to be maintained in the sense that witnesses are to be
12 referred to only by full names or last names, not just by
13 first names. And that's something that while you're
14 talking to witnesses you should go over. So, anyway,
15 thank you.

09:17AM

16 MR. WARD: One item we didn't discuss -- and
17 it's because we just e-mailed it, and I didn't e-mail it
18 to Mr. Walter. It was e-mailed to Mr. First -- was the
19 juror questionnaire. We might be a day late and a dollar
20 short, but we at least agreed on it and e-mailed it to
21 Mr. First. I e-mailed it at 8:00 o'clock this morning.
22 It's identical with the exception of Samsung's name in
23 rather than Apple's name. But just to bring that to the
24 court's attention.

09:17AM

25 THE COURT: It's my understanding that that's

09:17AM

1 the same questionnaire that Judge Gilstrap has approved
2 now for the *SmartFlash* trial which is the next week.

3 MR. WARD: Correct.

09:18AM

4 THE COURT: And I understand from our jury
5 coordinator that that is timely, that we can use that.
6 Both sides are in agreement with the document that was
7 sent in or not?

8 Have you had a chance to look at that,
9 Mr. Smith?

09:18AM

10 MR. SMITH: I have, your Honor; and we are in
11 agreement with it.

12 THE COURT: Okay. Then we will get that sent
13 out, and it will be available for you on that Thursday
14 afternoon before Monday the 9th.

09:18AM

15 MR. WARD: And will we get the juror -- in
16 addition to the juror questionnaire, the identities of
17 the jury panel, do we get that on that Thursday before as
18 well?

19 THE COURT: Yes.

09:18AM

20 MR. WARD: Okay. Thank you.

21 THE COURT: Okay. Thank you both.

09:19AM

22 It is Judge Gilstrap's practice also that any
23 Rule 50(a) motions should be reserved until the close of
24 all the evidence and that the record will indicate here
25 that you're protected on waiting until the close of all

1 the evidence. There is no need to urge those motions
2 when the plaintiff rests as long as they're asserted
3 after the close of all the evidence, and the judge will
4 give you an opportunity to do so.

09:19AM

5 There will also be an informal charge
6 conference after the close of all the evidence.

7 What is the status of the jury instructions?
8 Has a joint set been offered or filed by the parties?

9 Mr. Smith?

09:19AM

10 MR. SMITH: Interpreting "joint" broadly, yes,
11 it has, your Honor.

12 THE COURT: Okay.

13 MR. ALAVI: Your Honor, as a strict
14 instructionist, I'd say that we have not. I believe the
15 parties have agreed to try to work through and see if we
16 can submit a joint instruction for the court to consider,
17 and we'll take that up again and work on it.

09:20AM

18 THE COURT: Okay. Then, you know, what we
19 mean by "joint" is a single document that doesn't just
20 have competing paragraphs. In other words, if y'all are
21 in agreement on all but a sentence or two of a section,
22 we would ask that the joint document simply single out
23 the sentence or two that are not agreed to so that we can
24 focus the dispute as much as possible. It's not

09:20AM

09:20AM

25 particularly helpful to the court to have two very

09:21AM

1 similar but materially different offerings. We want to
2 be able to tell where you agree and disagree, and
3 certainly you're much more likely to get instructions
4 that resemble what you're offering if you focus the
5 dispute as much as possible. So, that's what we mean by
6 "joint"; and you've got a lot of past instructions to
7 guide you in that regard. I'm sure that that's something
8 that local counsel on both sides have great access to
9 but -- let's see.

09:21AM

10 Craig, when do we need to get those filed?
11 (Discussion off the record between the court
12 and the law clerk.)

09:21AM

13 THE COURT: So, what we'd ask in that regard
14 is if you can file your joint set by February the 2nd,
15 the Monday before the Monday of trial. And whenever I
16 talk about jury instructions, I'm talking about a verdict
17 form as well. So, to the extent you can agree on the
18 format of a verdict form, that will be helpful. And
19 certainly you know the court has practices and, you know,
20 to the extent you can get close to what the court has
21 done in the past, again you're more likely to get the
22 things that are important to you.

09:22AM

09:22AM

23 Okay. I know that you're still working on
24 objections to exhibits; but just to confirm, the practice
25 will be that at the end of this process there will be a

1 list of preadmitted exhibits. Those exhibits can be used
2 by either side, you know, at any stage of the case
3 without any further foundation or introduction.

09:23AM

4 However, as the trial goes along, we will ask
5 the parties to submit lists at the end of each day or
6 beginning of the next day of the exhibits that have
7 actually been used in front of the jury because it is not
8 all of the preadmitted exhibits that will form part of
9 the record. It is only the preadmitted exhibits that are

09:23AM

10 used in front of the jury. And, so, we're going to ask
11 you by either the end of the day, if you can get it done
12 then, or the beginning of the next day to submit to the
13 courtroom deputy clerk a list -- an agreed list of the
14 exhibits that are used; and those will be the exhibits

09:23AM

15 that will be available for the jury to review during
16 deliberation if they want to and will be considered a
17 part of the record for appeal. But anything that is not
18 on that preadmitted exhibit list will not be available to
19 be used during the trial unless it is truly impeachment.

09:24AM

20 And impeachment is fairly narrowly construed.
21 It's not a matter of rebuttal; it's not a matter of
22 contradiction. It's a matter of showing that the witness
23 has previously said or done something -- or I guess
24 actually has previously said something that is directly
25 contrary to the testimony offered in court.

09:24AM

1 Any questions about those procedures from
2 either side?

3 MR. SMITH: No, your Honor.

09:24AM

4 MR. ALAVI: I have one. And I'll meet and
5 confer with opposing counsel about this. But I think
6 both sides have conditional exhibits on their list; so, I
7 think both sides want to talk about if we preadmit those
8 and then -- there's an exhibit, for example, that
9 defendants have listed as conditional, they're not going
10 to want us to use them because they're not fully offering
11 them. So, perhaps we could meet and confer on that and
12 figure out a solution to that. Both sides have that
13 issue on their exhibit list, unless the court has already
14 dealt with that before and has a proposed solution.

09:25AM

15 THE COURT: Well, I've dealt with it before;
16 and we don't have a conditional exhibit list. I mean,
17 there will occasionally be an exhibit that will not be
18 put on the preadmitted list because it needs a foundation
19 that can only be laid in court and those will be
20 specified and, you know, you'll have to lay that
21 foundation before you can use it. That's a pretty narrow
22 category, given what the federal rules now say about
23 authentication and the like. So -- but I don't
24 understand -- if what you're describing as conditional is
25 "We're not sure if we want to use it," that is not a

09:25AM

09:26AM

1 category of -- well, I guess I'll wait until I hear the
2 argument on just what you mean by that.

3 MR. ALAVI: This was perfect guidance for us,
4 your Honor.

09:26AM

5 THE COURT: Okay.

6 MR. ALAVI: I think most of them fall out
7 based on how motions in limine are resolved. That was a
8 question that popped up, and your guidance gives us what
9 we need. Thank you.

09:26AM

10 THE COURT: Okay. And with respect to
11 deposition cuts, the same thing. I mean, we will work it
12 down to where all of the deposition designations are
13 either agreed to or resolved. You may still -- either
14 side may still decide not to play some deposition based
15 on the decisions that they make at trial, but we're not
16 going to leave it so that there are any objections to
17 those available deposition clips that have not been
18 resolved.

09:27AM

19 When you're working on your protocol regarding
20 notification about order of witnesses and all, you should
21 also decide what protocol you want to develop on exchange
22 of demonstratives. The court has typically not required
23 any exchange of demonstratives to be used for
24 cross-examination but certainly occasionally the parties
25 agree to it and that's available if you want to. But the

09:27AM

09:28AM

09:28AM

1 goal is to make sure that any objections to
2 demonstratives are aired before the trial starts that day
3 so that there isn't any need to slow things down for
4 them. So, as long as your protocol takes care of that,
5 then it will be fine. And if you have any more questions
6 about exactly how that should work, we'll take those up
7 when you've met and conferred and come up with it.

09:28AM

8 All right. The -- as far as the length, I saw
9 that the parties indicated that they agreed the case
10 could be resolved in five days. Looking at this and
11 looking at the way Judge Gilstrap has been handling
12 these, I don't see anything in this case that would
13 indicate that the parties need more than ten hours per
14 side; but I'll want to hear any arguments that the
15 parties may have about that.

09:29AM

16 Do you -- Mr. Ward or --

17 MR. WARD: Ten hours is fine with the
18 plaintiff, your Honor.

19 THE COURT: Mr. Smith?

09:29AM

20 MR. SMITH: Your Honor, I think we would ask
21 for 12. It's to some extent contingent on what the
22 court's rulings are on the pending motions and limine
23 motions. But if we have to develop a lot of issues
24 through cross-examination, we think that this would be a
25 case where we'd like to have up to 12 hours per side.

09:29AM

1 THE COURT: Okay. Well, I'll give you a
2 chance to re-urge that then when we finish the motions in
3 limine and we'll see. At this point I'm going to say ten
4 hours per side, but that's subject to revisiting if
5 necessary.

09:29AM

6 One thing I -- I saw in the record that the
7 parties had agreed to, I believe, and the court had
8 appointed Judge Michel as the mediator in this matter and
9 I saw a reference to a mediation that occurred in July.

09:30AM

10 Has there been any further mediation since then?

11 MR. ANAIPAKOS: Good morning, your Honor.
12 Demetrios Anaipakos. There has not. We had the one
13 session with Judge Michel and none since then.

09:30AM

14 THE COURT: All right. Is there any reason
15 why there should not be any further effort in that
16 regard?

17 MR. ANAIPAKOS: We wouldn't object to it, your
18 Honor.

19 THE COURT: All right.

09:30AM

20 MR. SHERWOOD: Your Honor, Jeff Sherwood for
21 Samsung. We don't certainly have any objection to having
22 further mediation.

09:31AM

23 THE COURT: All right. Well, what -- have
24 there been any settlement discussions since the mediation
25 session in July?

1 MR. SHERWOOD: There have not, your Honor.

2 MR. ANAIPAKOS: No, your Honor.

3 MR. SHERWOOD: The parties were quite far
4 apart, your Honor. That's why it didn't seem productive.

09:31AM

5 THE COURT: All right. Well, I may consult
6 with Judge Michel; and we'll get back to the parties on
7 that. Thank you.

8 MR. ANAIPAKOS: Your Honor, if I might.

9 Although we would certainly be happy to go back to

09:31AM

10 Judge Michel, I have found in other cases that he is
11 quite difficult to schedule. So, we would also -- to the
12 extent it's appropriate, we would agree to a mediator
13 other than Judge Michel for scheduling purposes.

14 THE COURT: Okay. All right.

09:31AM

15 Mr. Sherwood.

16 MR. SHERWOOD: Well, I think in the first
17 instance we ought to find out if Judge Michel can squeeze
18 us into his schedule because he obviously knows the case
19 and knows the history. That makes the most sense to me,
20 your Honor.

09:31AM

21 THE COURT: And I'm not hearing anything
22 different from plaintiff's counsel. Okay. Thank you.

23 All right. I know that there is a motion to
24 stay pending IPR review that was filed back last summer.

09:32AM

25 I know that there's been a recent -- or more recent

1 update based on what the PTAB did with that petition.
2 It's my understanding that the PTAB has not granted
3 review on a significant number of claims from the '580
4 and at least one of the asserted claims from the '228,
09:32AM 5 unless I have those backwards. But I -- so, my intention
6 would be to formally deny that motion for stay; but if
7 the parties have any further argument that they want to
8 offer not in terms of case law but in terms of why it
9 would make sense in this case to wait, I'll hear those
09:33AM 10 arguments.

11 MR. SHERWOOD: Your Honor, Jeff Sherwood for
12 Samsung. Just very briefly. The court is correct that
13 the PTAB has not instituted trial with respect to all of
14 the claims; and, in fact, we got an e-mail last night, I
09:33AM 15 guess, from the plaintiff saying that it has reduced the
16 scope of its claims to just those that are not instituted
17 for trial with the PTAB.

18 However, with respect to the '580, we strongly
19 believe that there are certain things that the PTAB
09:33AM 20 overlooked; and as a consequence of the PTAB's rulings on
21 the initial petitions, we filed additional petitions,
22 which was our right to do, about three months ago. So,
23 the timing with respect to those is that the statutory
24 deadline for a decision will not run its course for about
09:34AM 25 another three months. Decision could be made sooner;

1 but, you know, at this point nobody obviously knows how
2 that's going to go.

3 With respect to the '228 patent, the PTAB
4 instituted trial on every claim except one; and Rembrandt
09:34AM 5 has notified us that it is only going to trial with
6 respect to that one claim on the '228. We think here
7 again the PTAB overlooked some things with respect to
8 that decision. We have a pending motion for rehearing
9 with respect to that one, and we have the right and will
09:34AM 10 file sometime this -- or have filed, I guess -- I knew it
11 was going to happen this month -- additional petitions
12 with respect to that patent.

13 So, every one of them remain -- every claim,
14 that is -- remains before the PTAB either for some trial
09:34AM 15 action -- admittedly not with respect to the ones that
16 Rembrandt now asserts -- or, you know, we have asserted
17 additional rights with respect to those. So, what I'd
18 like to just say to the court -- and I appreciate where
19 we are in the proceedings and how the court may view
09:35AM 20 this; but, nonetheless, I -- Samsung has timely filed
21 these petitions. It has operated entirely within the
22 ambit of the AIA and the PTAB's rules. The motion to
23 stay seeks to give Samsung the benefit of those rights
24 and to have this review before the PTAB before the
09:35AM 25 jury -- a jury is required to actually sit and hear these

1 issues.

2 I don't think -- and, you know, this is in our
3 papers; so, I'm not going to -- if I understand the
4 court, you're not asking me to reargue the motion; and
09:35AM 5 I'm not going to do that.

6 THE COURT: That's right.

7 MR. SHERWOOD: But I don't see that there is
8 any prejudice here, recognizing of course that a lot of
9 work has gone into getting ready to take this case to
09:36AM 10 trial. So, that's where we stand today, your Honor.

11 THE COURT: All right. Thank you,
12 Mr. Sherwood.

13 MR. SHERWOOD: So, your Honor, just to be
14 totally clear, we are still asking for a stay.

09:36AM 15 THE COURT: I do understand that, and you're
16 not waiving any position. I guarantee that.

17 MR. SHERWOOD: Thank you.

18 THE COURT: Sure.

19 MR. HEIM: Your Honor, I'm happy to respond if
09:36AM 20 you'd like to hear a response.

21 THE COURT: Particularly as to the claims
22 being asserted. That would be helpful for me to know
23 what your position on that is.

24 MR. HEIM: Absolutely, your Honor. So,
09:36AM 25 Samsung has filed ten IPRs with respect to these two

09:36AM

1 patents, the '580 patent and the '228 patent. There were
2 decisions -- the initial decisions were issued by the
3 Patent and Trademark Office in September for the '580 and
4 in December for the '228 patent. With respect to both of
5 those decisions, there are certain claims that the PTAB
6 has indicated that it is not going to institute an IPR;
7 and with respect to those claims, Rembrandt is going to
8 assert a subset of those claims. In other words, the
9 only claims that are going to be asserted at trial in
10 this case are claims for which the PTAB has denied
11 instituting an IPR.

09:37AM

12 So, with respect to those claims, if we look
13 at the reasons that the courts typically look at for
14 issuing a stay, absolutely none of those apply here. The
15 stay is not going to simplify the issues because the PTAB
16 denied instituting IPR on those claims.

09:37AM

17 THE COURT: And you don't need to address the
18 factors.

19 MR. HEIM: Okay.

09:37AM

20 THE COURT: I understand your position on
21 them. But which of the claims are you still asserting?
22 I guess that's what I'm asking.

09:37AM

23 MR. HEIM: The claims that we're going to
24 assert at trial, your Honor, are '580 claims 2, 19, 52,
25 and 59 and claim -- '228 patent claim 21. All of those

1 claims have not been rejected or an IPR instituted on any
2 of those claims.

3 Defendant has filed additional IPRs, three
4 additional IPRs, after the one-year date. They are
09:38AM 5 seeking to make new arguments, enjoin their previous
6 IPRs. The PTAB is reviewing that right now. There has
7 been an opposition to that motion for joinder. No
8 telling when that's going to be decided. If it is
9 decided, I'm relatively confident that there are going to
09:38AM 10 be appeals that flow from that joinder decision.

11 THE COURT: Okay. Well, I understand that
12 Samsung is within its rights in pursuing all of the
13 appeals and review that the PTAB has to offer; but I am
14 going to deny the motion to stay with respect to the
09:38AM 15 asserted claims and will issue something in writing that
16 formalizes that for the record. But I just want the
17 parties to know that's coming.

18 MR. SHERWOOD: Your Honor, just one other
19 thing that I should have mentioned when I was up before.
09:39AM 20 In the e-mail, what Rembrandt says is that it's only
21 asserting these five claims now and reserves the right to
22 assert additional claims in the future, which I would say
23 is sort of a "two bites at the apple" kind of strategy
24 here. And I think that those claims that they are not
09:39AM 25 asserting that they have said they're going to drop need

1 to be dismissed with prejudice.

2 THE COURT: Well --

3 MR. SHERWOOD: And if they weren't dismissed
4 with prejudice, your Honor, then it seems to me that's
09:39AM 5 ample basis for a stay.

6 THE COURT: I tell you, that is an issue that
7 is not before me at the moment and if it needs to be
8 presented by either side, they can do so and we'll take
9 it up on that basis; but I'm not going to address that by
09:40AM 10 the seat of my pants.

11 MR. SHERWOOD: So, your Honor, I understand
12 then we could file a motion with respect to that?

13 THE COURT: Absolutely.

14 MR. SHERWOOD: Thank you, your Honor.

09:40AM 15 THE COURT: Okay. And by the "absolutely,"
16 I'm not trying to communicate that I have a particular
17 position on it. I'm just saying you're free to file one.

18 MR. SHERWOOD: I understood, your Honor.

19 THE COURT: Okay. There was an objection to
09:40AM 20 certain witnesses that I think -- I know the defendant
21 filed an objection to certain of plaintiff's witnesses,
22 and it may be true that there is an objection going the
23 other way. But if there are objections to witnesses that
24 are not reflected in the motions in limine which we're
09:40AM 25 about to take up, tell me that now.

1 Is there some objection beyond the motions
2 in limine? Mr. Enger?

3 MR. ENGER: Your Honor, I'll let defense
4 counsel speak for themselves; but I understand that the
09:41AM 5 three witnesses that are the subject of objections are
6 all going to be covered in the motions in limine.

7 THE COURT: Okay. That's good. Everybody is
8 in agreement?

9 MR. SHERWOOD: Yes, your Honor.

09:41AM 10 THE COURT: All right. Then let's turn to the
11 motions in limine.

12 MR. ANAIPAKOS: Your Honor, might I ask one
13 more housekeeping question?

14 THE COURT: Yes.

09:41AM 15 MR. ANAIPAKOS: Is there a particular
16 preference or practice that the court has with respect to
17 publishing exhibits to the jury that have obviously been
18 preadmitted?

19 THE COURT: All of the exhibits are presented
09:41AM 20 to the jury through the document display system, if
21 that's what you mean, as opposed to being in paper.

22 MR. ANAIPAKOS: Correct, your Honor.

23 THE COURT: Yeah. They're -- you know, I'm
24 not going to say it will never happen; but I have not yet
09:41AM 25 heard of a reason why the court has agreed to give the

1 jury any paper exhibits. I mean, other than the contents
2 of the jury notebooks that we've been over, those are the
3 only things that the jury typically has in paper. And if
4 you have a -- an argument you want to present on why we
5 should vary that on a particular thing, you're free to
6 make it; but the expectation is that all the exhibits
7 will be shown to them through the electronic system. And
8 that obviously is free for both sides to review that -- I
9 think everybody -- the local counsel I know are familiar
10 with it. There are screens that the jurors have now in
11 the jury box that they didn't have previously and, so, I
12 don't know if everybody has worked with the newer
13 equipment up there, but that's the way it's presented to
14 the jury.

15 MR. ANAIPAKOS: Thank you, your Honor.

16 THE COURT: All right. Okay. Who wants to
17 present the plaintiff's side of its motions in limine?

18 MR. ANAIPAKOS: Your Honor, Demetrios
19 Anaipakos. It looks like we've divided that by motion,
20 if that's appropriate with the court.

21 THE COURT: All right. Well, let's take them
22 up in whatever order you want to.

23 MR. ANAIPAKOS: Your Honor, I'll address the
24 first handful.

25 THE COURT: Okay.

1 MR. ANAIPAKOS: On the first motion in limine,
2 your Honor, I believe that we are largely in agreement.
3 This is the motion that relates to the use of what we
4 consider to be disparaging terms, "patent troll," things
5 like that. It appears as though Samsung has agreed to
6 limit its use to the term "patent assertion entity" and
7 also wants to be able to make the point that Rembrandt
8 does not make or sell products.

09:43AM

9 Your Honor, in our view, that's acceptable;
10 but it really is a question of degree. If the suggestion
11 is so repetitive with every witness at every turn, as in
12 other cases we have found that to be, and there is some
13 suggestion that the fact that the entity asserts patents
14 is somehow nefarious or immoral, then we would want to
15 revisit that with the court. But with that context, sort
16 of a limitation on the manner in which the terms are
17 used, we would be in agreement, I believe, on Motion
18 in Limine No. 1.

09:44AM

09:44AM

19 THE COURT: All right. Let me ask you if you
20 can argue this one in connection with what I think is the
21 last one of the defendants' motions in limine regarding
22 the Intellectual Discovery entity. Because it seems to
23 me in my mind that those two are somewhat related.

09:44AM

24 MR. ANAIPAKOS: Your Honor, Mr. Enger can
25 address that; but you've correctly predicted where we

09:45AM

1 would go with that. At least my sense is that if we did
2 get in -- sort of cross the line that I tried to
3 describe, albeit imperfectly, a moment ago, that that
4 would, in our view, open the door to a discussion of
5 Samsung's investments in nonpracticing entities. But if
6 Mr. Enger has something material to add, I'll step aside.

09:45AM

7 THE COURT: All right.

8 MR. ENGER: Your Honor, my co-counsel

9 Mr. Anaipakos pretty much correctly summarized our

09:45AM

10 position. If the line is crossed to suggest that
11 Rembrandt as a patent assertion entity is doing something
12 wrong or there's something immoral or improper about that
13 type of entity, there's evidence that Samsung is a major
14 shareholder in a company called "Intellectual Discovery"
15 which does the exact same thing. What's good for the
16 goose is good for the gander. If they can make the
17 arguments about us, we should be able to return and make
18 the same arguments about Samsung.

09:46AM

19 THE COURT: And, so, my understanding is that
20 you're saying that if a line is drawn that gives you
21 whatever protection you think you need on this issue,
22 that you do not intend to pursue the Intellectual
23 Discovery issue?

09:46AM

24 MR. ENGER: That's correct, your Honor.

09:46AM

25 THE COURT: Let me hear from counsel for

1 defendant.

2 Mr. Sherwood.

3 MR. SHERWOOD: Thank you, your Honor.

09:46AM

4 So, I think Mr. Anaipakos has fairly stated or
5 understood our position from our brief. We're not -- we
6 agree not to use all these terms like "patent troll,"
7 "bounty hunter," so forth, that are in their brief. We
8 do think that we are entitled to inform the jury with
9 respect to what Rembrandt actually is, which is a patent
10 assertion entity, and it's a fine enough term for us to
11 use and to reflect that it doesn't sell products and that
12 sort of thing.

09:47AM

13 If I understand the back and forth that's
14 going on here, what they're saying in effect is that if
15 we open the door -- in other words, we go beyond what
16 we're agreeing to here -- that they would have a right to
17 respond with respect to the Intellectual Discovery, or
18 whatever it's called, investment that Samsung has. And I
19 understand that; and I don't have any problem with that,
20 your Honor.

09:47AM

09:47AM

21 THE COURT: I just want to have this line as
22 clearly defined as possible so that hopefully we don't
23 have to get into -- or Judge Gilstrap doesn't have to get
24 into at trial whether it's been crossed. So, my goal
25 right now is to make sure that both sides are very clear

09:47AM

09:48AM

1 and the court is clear on what the line is so that we
2 won't have that problem. This is not the first time this
3 issue has come up; but in the past when it's come up, it
4 has come up so late in the case, as in late in the trial,
5 that that was the way it was resolved. And I think it's
6 being raised on a timely basis now; so, I just want to
7 make sure.

09:48AM

8 So, what you're saying is that the court can
9 grant Motion in Limine No. 1 except as to your ability to
10 argue and put on evidence that Rembrandt is a patent
11 assertion entity and that it does not manufacture or sell
12 products in this field.

09:48AM

13 MR. SHERWOOD: Right, right. The only other
14 little thing I would add is that to the extent they try
15 to argue commercial success as an indicator of
16 nonobviousness, we could of course say that they have had
17 no commercial success to point to because they have no
18 product that they've sold.

09:49AM

19 THE COURT: And certainly -- yeah, my -- I
20 wouldn't think that argument would implicate this line
21 but --

22 MR. SHERWOOD: I'm just trying to be careful
23 here. That's all, your Honor.

24 THE COURT: And I appreciate that.

09:49AM

25 MR. SHERWOOD: And because you asked for that,

1 I want to be thorough about this.

2 THE COURT: And I'm not disagreeing with you.
3 I'm just trying to think through whether that's something
4 I need to further explore on the record, but I don't
5 think I need to.

09:49AM

6 Any other way in which you think we could get
7 close to this line that we ought to take up now?

8 MR. SHERWOOD: I don't think so, your Honor.

09:49AM

9 THE COURT: Well, the effect of granting the
10 motion is that if you decide there is something else that
11 you feel is close to it, then you should raise that at a
12 bench conference or out of the presence of the jury.

13 MR. SHERWOOD: Right, right. Yes, right. I
14 understand, your Honor. That's in limine, in other
15 words.

09:49AM

16 THE COURT: Yes.

17 MR. SHERWOOD: Right. And, so, I think also
18 that would mean that our No. 14 would be granted.

09:50AM

19 THE COURT: That is where I think we're going.
20 Unless the door was opened because of a violation of this
21 ruling on Motion in Limine No. 1, then they would not be
22 entitled to get into in any way the Intellectual
23 Discovery.

24 MR. SHERWOOD: Right, right, yes.

09:50AM

25 THE COURT: Okay.

1 MR. SHERWOOD: That's my understanding, your
2 Honor.

3 THE COURT: Good. Is there anything --

09:50AM

4 MR. SHERWOOD: I guess Mr. Jenner is saying if
5 they attempt to violate this ruling --

6 THE COURT: Well, I'm going to grant 14 also
7 when we get there so that you will have that protection
8 as well.

09:50AM

9 MR. SHERWOOD: Okay. Great. Thank you, your
10 Honor.

11 THE COURT: Okay. Anything else on that,
12 Mr. Anaipakos, that we need to take up?

13 MR. ANAIPAKOS: No, your Honor. Thank you.

14 THE COURT: Okay. Then we're on to No. 2.

09:51AM

15 MR. ANAIPAKOS: Your Honor, I would hope that
16 No. 2 is likewise simple to resolve. It seems like it's
17 really twofold in my mind. One is that we don't believe
18 there's a need to review or a relevant purpose in

09:51AM

19 reviewing the ownership structure of Rembrandt, what
20 entities own what patent rights, what entities are the
21 parent entities, the subsidiaries, et cetera. It doesn't
22 seem relevant to any claim or defense.

09:51AM

23 And, also, your Honor, we would request that
24 the court grant the motion in limine as to the term
25 "corporate shell." It seems to suggest that there's some

1 nefarious purpose to having an entity that only holds the
2 patent, which isn't countenanced by the law. And
3 interestingly enough, your Honor, in defendants'
4 response, in Tab D they included this court's order in
5 the SSL case which in Motion in Limine No. 10 explicitly
6 granted the motion in limine as to the phrase "corporate
7 shell." So, for the same reasons, we would request that
8 the court grant the motion as to that term.

09:51AM

9 THE COURT: Okay. Mr. Sherwood, I guess my
10 question would be: Is there anything within the scope of
11 this motion regarding Rembrandt's corporate structure
12 that you do intend to or need to get into?

09:52AM

13 MR. SHERWOOD: Well, so, the only thing I was
14 going to say, your Honor, the phrase "corporate shell" I
15 don't think of as being pejorative; but what's behind it,
16 in my view, is the notion that Rembrandt is a company
17 that consists only of investors who are investing in
18 litigation. So, whether we accomplish that without
19 having used the phrase "corporate shell," I don't have a
20 problem with that *per se*. All I'm trying to say is,
21 again, we want to be able to make sure the jury

09:52AM

22 understands who the plaintiff is and that the plaintiff
23 doesn't have any products, doesn't have anything else
24 that it does other than acquire intellectual property for
25 the purpose of bringing lawsuits -- or licensing the

09:53AM

09:53AM

1 property, I should say.

2 THE COURT: All right. Mr. Anaipakos?

3 MR. ANAIPAKOS: And, your Honor, I think

4 therein lies the problem. It seems to me that their

09:53AM

5 concern is addressed with the court's prior ruling;

6 namely, they can say that we're a patent assertion

7 entity. They certainly can make the point that this

8 company holds this patent and no other substantial

9 assets, and I think that that accomplishes what they seek

09:53AM

10 to do. But we think it would be highly inappropriate and

11 prejudicial to get into investors and what the purpose of

12 an investment in Rembrandt is. Presumably, as a public

13 company in Samsung, we could look to a variety of nature

14 of their investors and speculate on the reasons for

09:54AM

15 investing there. So, that doesn't seem relevant to any

16 claim or defense. So, it seems to me, your Honor, that

17 provided they're allowed to make the point the court has

18 already articulated, that this is a patent assertion

19 entity, doesn't make or sell anything, I think their

09:54AM

20 concern is addressed.

21 THE COURT: Well, I guess I heard one

22 additional perhaps corollary of "patent assertion entity"

23 that was not made express in the argument a moment ago;

24 and that is that the business of Rembrandt is to license

09:54AM

25 and to litigate. And I'm assuming that -- from what

1 you're saying, that that falls within your understanding
2 of what they're allowed under that ruling to get into.

3 MR. ANAIPAKOS: I think that the -- the
4 business of Rembrandt to license intellectual property, I
09:55AM 5 think that's fair, your Honor. I think the suggestion
6 that our business is solely to litigate would be unduly
7 prejudicial and inaccurate, very candidly.

8 THE COURT: Well, they're not saying, as far
9 as I know, solely to litigate. But if it is that it is
09:55AM 10 to license and to litigate, is that something that you
11 have an argument against?

12 MR. ANAIPAKOS: I think we could live with
13 that, your Honor, to be candid about it. I think --
14 again, it's a question of degree; but there's no doubt
09:55AM 15 that we are asserting these patents and litigating them.

16 THE COURT: I've handled enough of these
17 trials to know that this is something that we're going to
18 hear early and often; so, I want to make sure that we're
19 addressing it.

09:55AM 20 MR. ANAIPAKOS: Right. As Mr. Ward points
21 out, that's precisely the concern. So, if it in fact is
22 going to be early and often, your Honor, I don't have a
23 problem with the characterization of our company as one
24 that seeks to license its intellectual property. If the
09:56AM 25 line is that we are a company that exists to file

1 lawsuits and that's the early and often mantra we're
2 going to hear, I think that, your Honor, would be unduly
3 prejudicial.

09:56AM

4 THE COURT: Well, how can the business of
5 Rembrandt be explained if it doesn't include
6 "litigation"? I mean, that -- I know there are -- the
7 nice word is "to litigate." The word that we'll hear is
8 "sue people." But what I'm asking is what kind of
9 reasoned argument is there to prevent that?

09:56AM

10 MR. ANAIPAKOS: Your Honor, I think they would
11 be entitled to say that part of what Rembrandt does is
12 file lawsuits to enforce the intellectual property it
13 owns. What I'm objecting to is the characterization that
14 that's the sole purpose of Rembrandt, that that's the
15 only reason we exist. There's plenty of intellectual
16 property that we can license and have licensed without
17 litigation.

09:57AM

18 THE COURT: Okay. All right.

09:57AM

19 Mr. Sherwood, I just -- what I want to do is
20 make sure that this line is, like I say, clear so that we
21 don't get into the matters involved in your Motion
22 in Limine No. 14. And what we had talked about before
23 was granted except as to the status of Rembrandt as a
24 patent assertion entity and the fact that they don't
25 manufacture or sell products. You may view it as

09:57AM

1 corollary, but I want to be clear about it.

2 Saying that they -- their only business is to
3 sue people is something a little different than what we
4 addressed before, and I just don't want you to think that
5 you can do something that doesn't open the door as to
6 Intellectual Discovery and not be clear about that.

09:57AM 7 MR. SHERWOOD: So, your Honor, I think I -- I
8 meant to correct myself to say "license" and "as
9 necessary litigate." That is what I understand their
09:58AM 10 business model to be. That's what I think Mr. Anaipakos
11 has said they can live with.

12 I do think it's a corollary, your Honor,
13 because I think when you say "patent assertion entity,"
14 well, that's just -- the jury doesn't know what that term
09:58AM 15 means until they come and --

16 THE COURT: Right.

17 MR. SHERWOOD: -- sit in the box, right? And
18 that's what it means.

19 THE COURT: Well, that's why what I want to --
09:58AM 20 the line I want to draw here, I want it to be as clear as
21 I can. Let's talk about what the actual arguments are
22 going to be; and if your actual argument is going to be,
23 you know, that their business is to license and sue
24 people, then let's get it out there so that we won't have
09:58AM 25 something come up at the trial that was not discussed

1 here, is what my concern is.

2 MR. SHERWOOD: Right, right. Well, I think
3 I've understood that that is something that we are going
4 to say and that the only issue here is whether we're
09:59AM 5 beating that drum so often that Mr. Anaipakos thinks that
6 it's prejudicial. I don't intend to do that, but I do
7 believe that we have the right to alert the jury to who
8 the plaintiff is and what their business model is. And
9 from looking at the cases where this issue has been
09:59AM 10 raised before and -- you know, they're in our pleading --
11 the court has generally agreed with that. And, so, to
12 the extent it's a matter of degree, I can represent to
13 the court we're not going to, you know, overdo it.

14 THE COURT: And the reason why I'm being
09:59AM 15 specific about this is you're right, in the past we have
16 generally simply said we deny motions like No. 1. But
17 now that's being coupled with the issue about
18 Intellectual Discovery for you or in *Apple* cases it's
19 about Rockstar, their investment in an entity that
10:00AM 20 asserts patents. And, so, the calculus is a little bit
21 different; and that's why I'm spending more time on it
22 now because I think that in return for keeping that issue
23 out of the case -- by "that" I mean the Intellectual
24 Discovery or Rockstar issue out of the case -- we're also
10:00AM 25 regulating a little closer what the defendants can argue

1 on the front end.

2 And, so, while I know you've got, I'm sure,
3 lots of cases you could cite where we have not granted
4 the kind of relief that the plaintiff is seeking here,
10:01AM 5 the reason we're getting into it is because the issue is
6 a little different now. So, I'm -- what I'm encouraging
7 you to do is to be as explicit about what you want to
8 preserve the right to argue as possible. So, if what
9 you're intending to say is -- you know, whatever the
10:01AM 10 business model is of Rembrandt, whatever it is you want
11 to argue to the jury, let's talk about that now in
12 whatever terms you want to use with the jury so that --
13 otherwise, there's going to be an immediate issue raised
14 to the judge that you've crossed this line and that opens
10:01AM 15 that door and I don't want to go there if possible.

16 MR. SHERWOOD: I understand, your Honor.

17 THE COURT: So, you're comfortable with
18 that -- you'll be telling the jury as far as -- what
19 you'll be telling the jury about their business model is
10:02AM 20 that it's to license and litigate, not just litigate.

21 MR. SHERWOOD: That's right, your Honor.

22 THE COURT: Okay. And as I say, I think
23 that's incumbent in the term "patent assertion entity"
24 which everyone has agreed and the court has previously
10:02AM 25 permitted to be used. The jury is entitled to an

1 explanation as to what that actually means and that
2 Rembrandt is such an entity.

3 THE COURT: Okay.

4 MR. WARD: Your Honor?

10:02AM

5 MR. SHERWOOD: If I could just say one other
6 thing while I'm up here.

7 MR. WARD: I'm sorry.

10:02AM

8 MR. SHERWOOD: There is also, with respect to
9 the structure more generally, a trail, shall we say, an
10 acquisition trail with respect to these patents that led
11 through a couple of Rembrandt entities. Summit
12 Technology I think is one of them. So, we certainly
13 don't want this ruling to somehow prevent us from tracing
14 that path before the jury as well.

10:03AM

15 THE COURT: I think there's a separate motion
16 that would address that in more detail, but I am not
17 addressing that in this ruling. I don't think that we're
18 talking about the assignment history of these patents in
19 what we're discussing right now.

10:03AM

20 MR. SHERWOOD: Thank you, your Honor.

21 MR. WARD: And, your Honor, very briefly,
22 since we're previewing what arguments might come up and
23 the court is interested in where that line gets crossed,
24 you know, Samsung has to realize this gun kicks as hard
10:03AM 25 as it shoots. They want to shoot at us and say we file

1 lawsuits and we sue people when our intellectual property
2 is trespassed upon; but Samsung has got to be careful
3 about beating this drum because Samsung files lawsuits
4 when its intellectual property is trespassed upon as
5 well. So, I've -- you know.

10:03AM

6 THE COURT: That would be another motion that
7 is not in front of me at the moment; but if Samsung wants
8 to prevent you from getting into that, then I expect
9 that's something I'll hear about from Samsung.

10:04AM

10 MR. WARD: I just -- my point is depending on
11 what they argue and how they argue it -- and I understand
12 there's some trial strategy that goes on that both
13 parties don't say "Here's what I'm going to argue and
14 here's how I'm going to attack you" but I can see a
15 scenario where if they do cross the line, where we will
16 be approaching the court to say, you know, they were
17 permitted to say that we're a patent assertion entity and
18 we filed a lawsuit in this case because they're
19 trespassing on our intellectual property. But if they do
20 what I typically hear Samsung has done in the past where
21 I've tried lawsuits against them, they say, "This company
22 exists to sue people," which you've heard that very same
23 argument.

10:04AM

10:04AM

24 So, I just want to highlight that there's that
25 issue that they have to be careful what they say because

10:04AM

1 they have some of the same -- I don't want to say
2 problems -- but the same activity.

3 THE COURT: Well, the one issue that is tied
4 to this ruling on your Motion in Limine No. 1 is the
10:05AM 5 Intellectual Discovery issue that's in their Motion
6 No. 14; and, so, what I'm saying is that they'll be -- I
7 mean, you'll be foreclosed from going into Intellectual
8 Discovery as long as they abide by this ruling. The
9 issue that you presented about whether Samsung itself, as
10:05AM 10 opposed to this other entity Intellectual Discovery, sues
11 people is something that, you know, you can explore with
12 Samsung's witnesses unless that's an issue that gets
13 addressed later.

14 MR. WARD: All right. Thank you.

10:05AM 15 THE COURT: Okay.

16 MR. ANAIPAKOS: Your Honor, if I could just
17 address the court's question on how specifically we
18 thought that these terms might be used. I can at least
19 share my concern and at least from my perspective what
10:05AM 20 would not be acceptable; and that is if defense counsel
21 tries to draw the stark contrast and says, "We're
22 Samsung. We're the largest electronics company in the
23 world. We employ thousands of engineers. And on the
24 other hand, you have Rembrandt. That's a patent
10:06AM 25 assertion entity which by the way, ladies and gentlemen,

1 means they sue people. That's what they do. That's
2 their business. They license and sue people." That to
3 me, your Honor, is the type of contrast that goes too far
4 and at least in our view would invite a discussion of
5 Samsung's investment in that type of an entity.

10:06AM

6 THE COURT: Well, you're not disputing that
7 Samsung has the right to argue that they have thousands
8 of engineers and sell products everywhere.

9 MR. ANAIPAKOS: Of course not, your Honor.

10:06AM

10 THE COURT: And as long as they include that
11 your business is both to license and to litigate, I'm not
12 understanding how the fact that they say those things
13 together would be a potential violation of this.

14 MR. ANAIPAKOS: I would simply say, your
15 Honor, that if they -- it depends on how it's delivered.
16 If it was delivered as the court just did, I would agree.
17 But if the focus is, "This is a patent assertion entity.
18 That means they're in the business of lawsuits. These
19 people make money by suing people," things along that
20 line, I think that would open the door to their
21 investment as well. It's really the focus of the
22 comments.

10:07AM

23 If the focus of the comments is, "Look, these
24 people are just repetitive suers, that's what they're in
25 the business of doing," things along those lines, I think

10:07AM

1 that's qualitatively different.

2 THE COURT: Well, you can certainly ask the
3 trial judge for whatever relief you think; but I want the
4 record to be clear that my ruling on this motion
5 in limine is only that as long as they put licensing and
6 litigating together, they're free to point out that that
7 is the business model of Rembrandt.

8 MR. ANAIPAKOS: Thank you, your Honor.

9 THE COURT: Okay. As to the corporate
10 structure, which is in No. 2, I don't know that I heard
11 from you, Mr. Sherwood. Help me out. Is there something
12 in that that -- aside from the issue about the ownership
13 history of the asserted parties, that you want to be able
14 to go into?

15 MR. SHERWOOD: Your Honor, the only thing is
16 that there is actually -- and it's actually an exhibit in
17 the deposition of -- well, I'm not sure whose deposition.
18 But there is an exhibit that explains the pathway that
19 these patents traveled essentially through the Rembrandt
20 corporate structure; and this is just simply a matter of
21 being able to explore how they got from Zhone to
22 Rembrandt Wireless. That's all. It's a historical,
23 archeological, chronological kind of thing. There's no
24 intent for there to be some sort of pejorative or
25 negative message with respect to that.

1 THE COURT: But again that relates to the
2 ownership history of these patents?

3 MR. SHERWOOD: Yes, your Honor. Yes, your
4 Honor.

10:09AM

5 THE COURT: Okay.

6 MR. SHERWOOD: And this drawing, which was
7 obviously hand-drawn at a deposition, is DX 1120, just
8 for the record.

10:09AM

9 THE COURT: All right. Mr. Anaipakos, I can
10 tell you that any objection to that specific exhibit
11 we'll take up in connection with the offer of that; but
12 as far as this motion in limine goes, do you have any
13 argument against granting it except as to the ownership
14 history of the asserted patents?

10:10AM

15 MR. ANAIPAKOS: As to chain of title, your
16 Honor, absolutely not. We would be fine with a
17 discussion of chain of title. That is not what is
18 contained in the exhibit which was just shown to your
19 Honor. I can address that if the court would like.

10:10AM

20 THE COURT: Well, we can get -- when we get to
21 that exhibit, we can take that up then.

22 MR. ANAIPAKOS: Very well, your Honor.

10:10AM

23 THE COURT: But as to this Motion in Limine
24 No. 2, I am granting that except as to the ownership
25 history of the asserted patent.

1 MR. ANAIPAKOS: Thank you, your Honor.

2 MR. SHERWOOD: And, your Honor, just to be
3 clear, obviously what we've just discussed about license
4 and litigate, I don't know if that's embraced in the
5 ruling on 1 or 2 but --

10:10AM

6 THE COURT: I think that's just No. 1. I
7 don't see how that would relate to corporate structure.

8 MR. SHERWOOD: That's fine, your Honor.
9 That's fine.

10:10AM

10 THE COURT: Okay. All right. No. 3, where do
11 we stand on that?

12 MR. ANAIPAKOS: Your Honor, candidly, on No. 3
13 I was a little bit confused as to where we stood. I
14 didn't expect this to be controversial, that evidence
15 regarding unrelated lawsuits on both sides should be at
16 this point limined out. I read the defendants' response;
17 and it seemed in my mind to create, respectfully, a bit
18 of a straw man. We are not trying to argue that the
19 defendants cannot make the argument that our

10:11AM

20 specifications do not sufficiently disclose a basis for
21 the claims in the lawsuit. That is something that we
22 acknowledge they have the right to make, and we will
23 debate. So, that's simply not what we are trying to do
24 with respect to this motion in limine. But the existence
25 of other lawsuits and results in other lawsuits is not

10:11AM

10:11AM

1 relevant and should be properly granted as a motion
2 in limine.

3 THE COURT: All right.

4 Ms. Higgins.

10:12AM

5 MS. HIGGINS: Yes, your Honor. I think, first
6 and foremost, the problem that we have with this motion
7 is we really don't know what they're getting at. It's
8 vague; it's overbroad; and, you know, we don't see any
9 lines being drawn here. And, so, in the first instance,

10:12AM

10 we respectfully request that the motion be denied because
11 it is overbroad; and if there is a specific issue that
12 plaintiff's counsel has, it should be raised on a
13 case-by-case basis. We were then left, if you see our
14 opposition, your Honor, to quite frankly try to guess at
15 what plaintiffs were getting at; and what we are
16 concerned about is we do not want to be precluded here
17 from presenting relevant, nonprejudicial evidence and I
18 think specifically with respect to damages.

10:12AM

19 We mention in our motion *Georgia-Pacific*
20 Factor No. 5, the relationship between the licensor and
21 licensee, which once again could get into this, you know,
22 specific testimony about Rembrandt's business, license
23 and litigate. You know, there could also be evidence --
24 there's a pending motion, your Honor, a motion for

10:13AM

25 summary judgment, regarding marking. There are

1 agreements here in this case where, you know, if we get
2 into that -- this is an example. You know, we believe
3 that Rembrandt has no policy of requiring its licensees
4 to mark. And of course if something comes up with
5 respect to Rembrandt witness' testimony on the stand, we
6 of course would be entitled to impeach that witness with
7 a statement that was made in another litigation. So, you
8 know, in summary, it's the overbreadth of this motion
9 that is the main problem for us.

10:13AM

10 THE COURT: Well, and just to try and flesh
11 this out a little better, I know that there's an issue
12 about the BlackBerry license that I guess we'll get into.
13 Other than other licenses that may have been entered into
14 by Rembrandt, is there any previous litigation involving
15 Rembrandt that Samsung intends to introduce or refer to
16 in this case?

10:14AM

10:14AM

17 MS. HIGGINS: The specifics that I have in
18 mind, your Honor, are license related.

19 THE COURT: Okay. And that's, frankly, an
20 issue that's easy to separate out.

10:14AM

21 And I understand that if you have testimony of
22 a witness that was given in some other case, you can
23 impeach the witness with that without going into the
24 other case. Certainly you can just ask the witness if
25 they testified previously on such and such a date, such

10:15AM

1 and such a way.

2 MS. HIGGINS: Yes, your Honor.

3 THE COURT: All right. So, what I'm hearing
4 is my -- my indication is -- or my inclination is to say
10:15AM 5 that this will be granted except with respect to any
6 licenses that become involved in the case and --

7 MS. HIGGINS: And, your Honor, there may be
8 related communications that go along with the licenses as
9 well.

10:15AM 10 THE COURT: Okay. I understand that and we'll
11 take those up, but I -- I can frame it broadly so that it
12 would be except as to matters that relate to licenses
13 entered into in other litigation. Okay.

14 MS. HIGGINS: Thank you, your Honor.

10:16AM 15 THE COURT: Thank you, Ms. Higgins.

16 Is there anything further I need to hear from
17 plaintiffs on that?

18 MR. ANAIPAKOS: No, your Honor.

19 THE COURT: Well, then, I'm going to say
10:16AM 20 that --

21 MR. SMITH: Your Honor?

22 THE COURT: Yes, Mr. Smith.

23 MR. SMITH: I had one clarification on that.
24 When Mr. Anaipakos described the motion, he talked about
10:16AM 25 other lawsuits by both sides limined out. I was just

1 wanting a clarification to the court's order. Other
2 lawsuits from both sides are limined out with the
3 exception the court stated, or is it just lawsuits by
4 Rembrandt?

10:16AM

5 THE COURT: Well, I am happy to expand the
6 scope of it along the lines that were issued. And let me
7 inquire from the other side. Thank you, Mr. Smith.

8 MR. ALAVI: Your Honor, if I can address that,
9 because it relates to damages.

10:16AM

10 THE COURT: All right. Would you go to the
11 mic.

12 MR. ALAVI: I think it's a similar caveat as
13 Samsung's counsel pointed out. In Samsung's damage
14 report, the damage expert is relying on a license that

10:17AM

15 Samsung entered into in another piece of litigation and
16 one of the lines of impeachment with that damage expert
17 is the history of that litigation and what led to the
18 licensing, things that he did not consider about that
19 case when he argued that that is a comparable license

10:17AM

20 that should set the license rate for this case. So, we
21 think what's good for the goose is good for the gander in
22 terms of we won't talk about Samsung's other litigation
23 with the exception that to the extent their expert is
24 going to stand up and say "Samsung entered into a license

10:17AM

25 in this other case," we're entitled to cross-examine and

1 impeach the expert about what he did and did not do with
2 respect to that license and that litigation to determine
3 whether or not it was a comparable license and whether or
4 not his opinions on that license are consistent with his
5 criticisms of our experts about license agreements.

10:18AM

6 THE COURT: All right. And what I'm going to
7 do, then, is just say that Motion in Limine No. 3 is
8 granted, that it will apply to both sides, and that it
9 excludes any reference to other litigation involving
10 either party except as to matters relating to licenses
11 from that litigation. And those are matters we'll take
12 up separately if necessary, but this -- so, all we're
13 talking about here is litigation not relating to licenses
14 that are at issue in the case.

10:18AM

15 MR. ALAVI: That's fine, your Honor.

10:18AM

16 THE COURT: Everybody is okay with that?

17 MS. HIGGINS: Yes, your Honor.

18 THE COURT: Okay. No. 4.

19 MR. ANAIPAKOS: Yes, your Honor.

10:19AM

20 THE COURT: This is one, frankly, that is new
21 to me. So, tell me what it is you're concerned about,
22 Mr. Anaipakos.

23 MR. ANAIPAKOS: Yes, your Honor. Specifically
24 the concern is that there will be some argument or

10:19AM

25 evidence put on by Samsung that the fact that Rembrandt

1 had in its possession the Bluetooth + EDR specification
2 is somehow improper or nefarious and that we did
3 something illegal, improper, or immoral by filing claims
4 with the patent office at the time that we had the
10:19AM 5 Bluetooth specification in hand. The *Kingsdown* case and
6 others make it quite clear that we're within our legal
7 right, as Samsung does frequently as well, filing
8 continuations and continuations-in-part. So, the --
9 ultimately the argument is, as the court is well aware,
10:20AM 10 whether there was adequate disclosure in the filings and
11 in the specifications to support the claims. We're not
12 trying to hamstring that argument.

13 Our concern is that they argue that somehow it
14 was improper, unfair, not right for Samsung to have -- I
10:20AM 15 mean, for Rembrandt -- pardon me -- to have in its
16 possession the Bluetooth specification. That would be
17 impermissible in that it suggests that activities around
18 a continuation are somehow beneath the pale.

19 THE COURT: All right.

10:20AM 20 MR. HADDAD: Your Honor, we want to just be
21 very clear that we can go into the facts of the
22 prosecution history, explain how that prosecution history
23 unfolded. It goes, as Mr. Anaipakos alluded, to our
24 defenses under Section 112 -- 35 U.S.C., Section 112,
10:21AM 25 with respect to invalidity due to lack of written

1 description and invalidity due to enablement. I don't
2 think Rembrandt opposes that. I just wanted to make it
3 very clear.

4 It also goes to the issue of willfulness, your
10:21AM 5 Honor, the timing of when the accused feature became
6 public in 2004 and the claims weren't filed until 2009.
7 That's just a fact of the prosecution and the history of
8 this case, and that's -- we still want to be able to
9 raise those factual issues, your Honor.

10:21AM 10 THE COURT: Okay. Thank you, Mr. Haddad.

11 MR. ANAIPAKOS: And, your Honor, the issues
12 that -- the invalidity issues, et cetera, that are being
13 raised, we have no issue with that. Our issue is really
14 precise. It's that there be no suggestion that the fact
10:22AM 15 that we had the Bluetooth manual in our possession is
16 somehow improper, that the filing of a continuation was
17 somehow improper. That's the limited issue on which
18 we're seeking relief from the court.

19 THE COURT: Well, I'm -- frankly, I -- I think
10:22AM 20 this is a matter that's just going to have to be
21 addressed, if necessary, on jury instructions. To try
22 and limine out implications is just difficult, and I --
23 this is an issue that I don't think is clearly enough
24 defined. So, I'm going to deny No. 4.

10:22AM 25 And I understand No. 5. Let me hear from the

1 defendants as to the limited issues asserted in that,
2 which as I understand the motion is just whether Samsung
3 is going to argue that the patents or claims asserted are
4 limited to modems or do not encompass wireless networks.

10:23AM

5 MR. HADDAD: Your Honor, we're not going to
6 argue contrary to the claim construction that your Honor
7 has issued in this case. So, specifically that, we will
8 not be arguing that.

10:23AM

9 We will be arguing, as I mentioned in response
10 to Motion in Limine No. 4, that what's covered in the
11 court's claim construction is not supported by the
12 specification. So, there will be arguments that --
13 directed to our invalidity defenses with respect to
14 enablement and written description. In fact, in your
15 Honor's July 10th claim construction order, your Honor
16 recognized that very defense and said, "Defendants'
17 argument in this regard appears better suited to a
18 written description challenge because validity analysis
19 is not a regular part of the claim construction order."

10:23AM

10:24AM

20 THE COURT: And I understand that. I am
21 interpreting this Motion in Limine No. 5 as limited to
22 the two specific issues raised there, and that would be
23 any argument that the claims are limited to modems and
24 any argument that the claims do not encompass wireless
25 networks. I'm not saying I necessarily agree with them.

10:24AM

1 I've got -- if there's an argument about that, I want to
2 hear both sides.

3 MR. HADDAD: There's no argument, your Honor.

4 THE COURT: Okay. So, you're not going to
5 take that position.

6 MR. HADDAD: Correct, your Honor.

7 THE COURT: Okay. Then I am going to note
8 that because Samsung has specifically indicated that
9 they're not taking the positions that are indicated in
10 there, I'm going to make that notation but deny the
11 motion. Obviously the law is that, you know, you're
12 bound by the claim construction. I think both sides know
13 that. I don't issue limine rulings that just say "Follow
14 the law." So, if there's a specific issue beyond what I
15 just addressed, I want to hear about it; but otherwise,
16 that's what I'm going to do.

17 Mr. Enger, do you have a point you want to
18 make?

19 MR. ENGER: Yes, your Honor. I just want to
20 make very clear what the written description argument is
21 that they say they're going to make. If they're going to
22 argue that the claims are not supported by the
23 specification because the specification only discloses
24 wired modems that do not communicate multilingually with
25 multilingual slaves, that's not proper.

1 What the argument needs to be framed as is the
2 spec doesn't disclose a master communication device that
3 communicates with so-called "multilingual tribute
4 communication devices." If they're going to try and, you
5 know, introduce modems and wired networks into that whole
6 discussion, not only is that contrary to the court's
7 claim construction order, it's actually contrary to the
8 representation they made with respect to the motion to
9 strike.

10 In that motion -- it's Docket No. 178 at
11 page 16 -- they represented to the court that (reading)
12 Samsung's wireless transmission written description and
13 enablement arguments will not be presented at trial and
14 Samsung withdraws those sections of Dr. Goodman's report.

15 So, that's a fine-tunement on this MIL that I want to
16 make sure we're crystal-clear on.

17 THE COURT: I think we have failed the
18 crystal-clear standard.

19 MR. ENGER: If -- there's more information I
20 can provide or --

21 THE COURT: Well, let me just say that I'm not
22 going to try and anticipate every argument that Samsung
23 might make and issue a ruling now as to whether or not it
24 runs afoul of the claim construction order. I mean, I
25 think Samsung is well aware that if they make an argument

1 that's contrary to claim construction, the court is going
2 to tell the jury, you know, what the claim construction
3 is; and that's a very painful thing to have happen. So,
4 I don't expect them to do that.

10:27AM

5 But the only thing I did want to be clear
6 about was you've made two specific issues in your motion.
7 I wanted to make sure we addressed those. I think we
8 have. Whether or not their argument on any other issue
9 or more nuanced version of this runs afoul of it is

10:27AM

10 something we'll just have to wait and see what arguments
11 they make.

12 But I'm going to deny No. 5, pointing out in
13 the ruling that Samsung indicated they're not going to
14 make the two arguments that were at issue in that motion.

10:28AM

15 And as far as the rest of it, you know, the court has the
16 claim construction and will hear if you think specific
17 arguments run afoul of it.

18 MR. ENGER: Thank you, your Honor.

19 MR. HADDAD: Thank you, your Honor.

10:28AM

20 THE COURT: Mr. Haddad, is there anything else
21 you think would be helpful to discuss on that point?

22 MR. HADDAD: No, your Honor. Thank you.

23 THE COURT: Okay. On No. 6.

24 MR. AYCOCK: Jamie Aycock for Rembrandt.

10:28AM

25 For No. 6, your Honor, the rights of the

10:28AM

1 patents that are asserted here were sold as part of a
2 portfolio for \$5 million; and in the purchase agreement,
3 the \$5 million was allocated among 74 different patents
4 and patent applications. What we're asking for is for
5 you to exclude any reference to the pro rata allocation.
6 We think that it's not relevant and it's highly
7 prejudicial. There's testimony from Rembrandt's
8 corporate representative that no valuation was done as
9 part of that allocation and that the allocation was made
10 to ensure consistent reporting the IRS.

10:29AM

11 And we think this is very similar, your Honor,
12 to an order that you issued just a few months ago in a
13 case that was against Samsung. We've cited that in our
14 briefing. But there you said that -- and it involved a
15 filing that was a 10-K filing with the SEC.

10:29AM

16 THE COURT: I remember the ruling.

10:29AM

17 MR. AYCOCK: Okay. And there were a host of
18 different business considerations that went into that
19 allocation, and they were too far removed from the
20 hypothetical negotiation that's to be presented to the
21 jurors. Samsung, as you know, your Honor, has argued
22 that that's different because it was a 10-K filing as
23 opposed to an agreement between the parties.

10:29AM

24 But here we don't think there's any reason
25 that that should be treated differently. It was an

1 allocation. The same considerations that you had then
2 apply here.

3 THE COURT: What was the date of the
4 transaction at issue?

10:30AM

5 MR. AYCOCK: The transaction involving the
6 purchase agreement?

7 THE COURT: Yes.

8 MR. AYCOCK: It was in 2007.

10:30AM

9 THE COURT: And it was a transaction between
10 what parties?

11 MR. AYCOCK: Well, it involved Zhone
12 Technologies and Summit. Rembrandt I don't believe was a
13 party to this agreement. Rembrandt is mentioned in the
14 agreement.

10:30AM

15 THE COURT: Who were the -- it was a sale by
16 which entity to which entity?

17 MR. AYCOCK: It was from Zhone to Summit, and
18 there were -- there's a subsequent history as well, your
19 Honor, obviously.

10:30AM

20 THE COURT: And you say it involved 74
21 patents?

22 MR. AYCOCK: 74 patents or patent
23 applications.

10:31AM

24 THE COURT: All right. Thank you. Let me
25 hear from the defense on that. Then I'll give you a

1 chance to respond, Mr. Aycock.

2 MS. HIGGINS: Your Honor, first I want to make
3 clear that this agreement is between Zhone, who was a
4 practicing entity at the time, and Summit; and while
5 Mr. Aycock said Rembrandt wasn't a party to the
6 agreement, I think it's important to know that Summit is
7 a Rembrandt entity. It is a commonly-owned partner of
8 other Rembrandt entities.

9 First, with respect to the agreement itself, I
10 think it is also critical here that the allocation clause
11 that we're talking about is an integral clause to the
12 agreements in that this is a clause that was negotiated
13 at arm's length between Zhone and this Rembrandt entity
14 Summit. The agreement includes specifically patents,
15 including, as part of the portfolio, applications which
16 led to the patents-in-suit. And, also, I understand that
17 your Honor has in mind the facts from the *MTel* case that
18 was referenced.

19 Here I think it's really important to note
20 that these are the only assets -- patents are the only
21 assets here. We're not talking about the situation where
22 an entire business, such as that SkyTel business, was
23 being sold. So, we don't have that same situation as in
24 MTel where we're far removed from the hypothetical

25 negotiation. In fact, here we actually have a Rembrandt

1 entity in 2007 negotiating a price for these patents. In
2 fact, 2007 is also the time I think you will hear -- you
3 may hear later from Mr. Jenner, Mr. Weinstein,
4 Rembrandt's expert, is also basing one of his
5 methodologies on chip price data from the late 2006-2007
6 era. It's very important to note that this is an
7 after-the-fact unilateral allocation and -- excuse me --
8 in the *MTel* case it was an after-the-fact unilateral
9 allocation, and here we don't have that. This is an
10 express clause within the agreement that explicitly says
11 "purchase price shall be allocated pro rata among all
12 assigned patents"; and that's Exhibit B, Samsung
13 opposition at page 5. That specific language right in
14 the agreement is cited right there.

15 The agreement is crystal-clear. It outright
16 says the patents are to be allocated pro rata. We heard
17 from Rembrandt that, oh, well, this goes to tax purposes;
18 and I submit to you, your Honor, that, you know, the
19 agreement is the agreement and it's crystal-clear and
20 that's an improper use of parole evidence to vary the
21 terms of the agreement.

22 And, also, with respect to Rembrandt's
23 position that this should not come in, this is a critical
24 piece of evidence here. This is a license that has to do
25 with the patents-in-suit. It has to do with the very

1 party, Summit, who is a Rembrandt entity, who is, you
2 know, sitting at that table at the hypothetical
3 negotiation. So, we think, both as a matter of relevance
4 and a matter of what the jury should hear about, this is
5 highly relevant to this case.

10:35AM

6 THE COURT: You said this is a license?

7 MS. HIGGINS: This is a sale of the patents.
8 There is a license back to the practicing entity, Zhone,
9 in the agreement.

10:35AM

10 THE COURT: Well, it's hard to say that this
11 constituted any valuation of the 74 patents since they
12 just said they would allocate it pro rata. How do you
13 think -- why should the court allow that to be offered as
14 some indication of valuation of the patents?

10:35AM

15 I mean, it would be one thing if they went
16 through and discussed the patents separately but --

17 MS. HIGGINS: Because respectfully, your
18 Honor, that's what the parties agreed to. If you look
19 at -- it's Exhibit B, and it's also at page 5 of the
20 opposition.

10:36AM

21 In the agreement itself, Zhone and Summit,
22 this Rembrandt entity, agreed -- it says, "In
23 consideration of the assignment of the assigned patents
24 to Summit by company, Summit agrees to pay company the
25 lump sum of \$5 million." And then it goes on to say

10:36AM

1 "where the purchase price shall be allocated pro rata
2 among all assigned patents." So, that's what the parties
3 agreed to, your Honor. That is what is in the agreement.

4 THE COURT: I understand. And my question is:
5 Why should I take that as a valuation of the patent as
6 opposed to what it purports to be, which is just an
7 allocation of the price for whatever consequences that
8 might have?

9 MS. HIGGINS: Well, it's an allocation of the
10 price of the 60 patents and 14 patent applications that
11 were assigned per this patent sale agreement.

12 THE COURT: All right. I understand that
13 argument. Thank you.

14 MR. AYCOCK: If I may, your Honor, you're
15 right that this is an allocation, it's not a valuation.
16 I think those are decidedly different terms. Also -- and
17 that's exactly what your ruling was in that *MTel* case.
18 And I think actually there are reasons that in the *MTel*
19 case the 10-K filing was actually even a more reliable
20 guide for valuation. It was a public filing. It was an
21 internal valuation, not between just the parties that
22 were in the confidential agreement --

23 THE COURT: What's your position, Mr. Aycock,
24 as to the purpose of this allocation?

25 MR. AYCOCK: There's actually testimony on

1 point from Rembrandt's corporate representative who says
2 that this was to ensure that there was consistent
3 reporting to the IRS by both parties. It was easier to
4 just make a straight pro rata allocation to all of the 74
5 patents or patent applications.

10:38AM

6 THE COURT: Does that have to do with some
7 basis to be used in the event of a further sale of
8 particular patents or --

9 MR. AYCOCK: I believe so. It has to do with
10 capital gains and capitalization. The reference has to
11 do with -- it's for tax purposes.

10:38AM

12 THE COURT: All right.

13 MS. HIGGINS: Your Honor, that's obviously
14 Rembrandt's position and the testimony of a Rembrandt
15 witness. I would submit to you that that's parole
16 evidence that repudiates the terms of the agreement which
17 says that the allocation is pro rata.

10:38AM

18 And in any event, what he's talking about goes
19 to the weight here, not the admissibility of that
20 agreement and the pro rata allocation within the
21 agreement.

10:39AM

22 MR. AYCOCK: Your Honor, if I may. The
23 situation is very different from the hypothetical
24 negotiation here. Samsung's expert doesn't contend
25 otherwise. Here, there's no -- there is no assumption

10:39AM

1 that the patents are valid, that they infringe. There's
2 no knowledge about the extent of the use of the patent.
3 This was four years before the hypothetical negotiation
4 took place. So, for all of those reasons, we also think
5 that they're not relevant and only likely to be highly
6 prejudicial.

10:39AM

7 THE COURT: And, Mr. Aycock, you are not
8 disputing that Samsung can offer evidence that the
9 asserted patents were part of a portfolio that sold for
10 \$5 million in 2007?

10:39AM

11 MR. AYCOCK: That's correct, your Honor.
12 We're only talking about the pro rata allocation itself.

13 THE COURT: Okay. Ms. Higgins.

14 MS. HIGGINS: I just wanted to add, your
15 Honor -- actually we're good.

10:40AM

16 THE COURT: Okay. Thank you.

17 I'm going to grant this motion in limine under
18 Rule 403, with the finding that the pro rata allocation
19 is based on many factors which are not related to an
20 actual valuation of these individual patents and that it
21 would be unduly confusing to the jury and prejudicial to
22 the plaintiff to allow that pro rata allocation.

10:40AM

23 I think, frankly, the fact that the sale of
24 the portfolio is coming in is more than adequate to allow
25 Samsung to get the benefit of that evidence. So, as to

10:41AM

1 the pro rata allocation, that part will not be shown to
2 the jury through evidence or argued to the jury.

3 And we will take a recess now and then come
4 back and finish up the motions in limine.

10:41AM

5 (Recess, 10:41 a.m. to 10:56 a.m.)

6 THE COURT: I think we're up to the
7 plaintiff's Motion in Limine No. 7.

8 Mr. Enger.

9 MR. ENGER: Yes, your Honor. This motion

10:57AM

10 in limine seeks to exclude evidence and argument
11 regarding Samsung's patents as a defense to infringement.
12 From reading Samsung's response, it seems like they
13 agree; they're not going to use their patents as a
14 defense to infringement. So, I'm not sure what the -- to
15 use the phrase "Where's the beef?" I'm not sure what the
16 problem is here.

10:57AM

17 THE COURT: All right. Is there an issue that
18 we need to address?

19 MS. BIANROSA: Your Honor, Jennifer BianRosa

10:57AM

20 for Samsung. Samsung does agree that it won't use its
21 own patents to make an argument that it doesn't infringe
22 the Rembrandt patents-in-suit, but Samsung should be
23 permitted to elicit testimony and make argument
24 consistent with its damages expert report concerning what
25 type of organization Samsung is and that may relate in

10:57AM

1 part to the fact that Samsung does own patents.

2 THE COURT: Well, certainly there's no problem
3 with Samsung mentioning the ownership of patents. I
4 think the only issue here is to whether there will be an
5 implication that that's a defense to infringement of the
6 particular asserted claims, and what I'm hearing is that
7 is not a problem.

8 MS. BIANROSA: That is not the intention.

9 THE COURT: Okay. Then I'll show that that
10 one is granted by agreement.

11 And I think that the specific reservation that
12 you made about the testimony on the damages side that
13 Samsung owns patents is not foreclosed by this ruling.
14 Okay.

15 MR. ENGER: Your Honor, are you ready for
16 Motion in Limine No. 8?

17 THE COURT: Yes.

18 MR. ENGER: This is a limine motion that
19 prohibits Samsung from criticizing the patent office or
20 its employees, calling patents monopolies, or otherwise
21 denigrating the patent system. Samsung's response again
22 appears to agree to this motion in limine. Samsung does
23 point to two particular things it says it intends to do.
24 It intends to refer generally to the content in the FJC
25 juror instructional video and to argue the propriety of

1 the examiner's ultimate determination to allow the
2 patents-in-suit.

10:59AM

3 Frankly, your Honor, either one of those two
4 run afoul of this limine motion. This is not what this
5 is designed to prohibit. So, we don't really see a
6 dispute; and for that reason, the court should grant it.

7 THE COURT: All right.

10:59AM

8 MS. BIANROSA: Your Honor, I'd just point out
9 that Samsung does have invalidity argument in this case
10 and invalidity argument necessarily questioning whether
11 the patent examiner was correct in allowing the patents.
12 So, Samsung should therefore be allowed to introduce
13 evidence about the prosecution of the patents-in-suit and
14 the propriety of the examiner's decision in allowing
15 those patents.

11:00AM

16 THE COURT: And I don't think that that is in
17 any way a violation of the order that's sought here.
18 This order would apply to arguments like the patent
19 examiners only have a certain number of hours per, you
20 know, year that they can devote to each patent
21 application or that they don't have enough expertise in
22 certain areas or other similar arguments. It definitely
23 does not prevent Samsung from arguing that the examiners
24 made a mistake in this case or from commenting on any of
25 the matters that are talked about in general in that

11:00AM

11:01AM

1 instructional video.

2 So -- and I take it also that you don't intend
3 to refer to patents as monopolies.

4 MS. BIANROSA: We do not, your Honor.

11:01AM

5 THE COURT: Okay. Then I think that I'll show
6 that this No. 8 is granted but that it does not prevent
7 argument that the examiners were in error in issuing
8 these claims -- or this patent.

11:01AM

9 MR. ENGER: Your Honor, Limine Motion No. 9
10 prohibits Samsung from introducing evidence or argument
11 about Rembrandt's indirect owners and improper character
12 evidence about Rembrandt's indirect owners. For example,
13 that one may be a professional poker player. This type
14 of evidence and argument is irrelevant to the issues in
15 this case and would prejudice the jury against Rembrandt.

11:02AM

16 From its response, again Samsung seems to
17 agree to this MIL. Samsung does say that it intends to
18 elicit factual testimony about Rembrandt's business model
19 but that factual testimony would seem to be more covered
20 by the limine motion that your Honor granted this morning
21 with respect to MILs 1 and 2 which the court already
22 heard argument on.

11:02AM

23 Samsung also intends to elicit testimony
24 regarding the potential financial interest of the
25 witnesses in the outcome of this litigation. However, as

11:02AM

1 Rembrandt's indirect owners are not going to be witnesses
2 in this case, that would not be covered by this MIL
3 either.

11:02AM

4 THE COURT: And, Mr. Enger, tell me: When you
5 use the term "indirect owners," what does that mean?

6 MR. ENGER: For example, the shareholder, the
7 stakeholder of Rembrandt, the ultimate shareholder.

8 THE COURT: Is there a difference between
9 indirect owners and direct owners?

11:03AM

10 MR. ENGER: Well, you know, I guess to the
11 extent if I own one share of Coca-Cola stock, I'm an
12 indirect owner of Coca-Cola; but to suggest that I own
13 the company is quite a different story.

11:03AM

14 THE COURT: Okay. I just didn't know if there
15 was some particular meaning in this case or -- is there
16 another group of individuals or entities who you consider
17 to be the direct owners?

11:03AM

18 MR. ENGER: Well, there are a number of
19 corporate entities that own other corporate entities.
20 Those are the types that would not be prohibited by this
21 MIL.

22 What we're really getting at here, your Honor,
23 is this particular shareholder who may be the poker
24 player. That's what we don't want to come in.

11:03AM

25 THE COURT: All right. So, then the way I

1 interpret this is that it's seeking to avoid evidence or
2 argument about individuals who are shareholders of
3 Rembrandt. And with that limitation, is there any
4 opposition to it from the defendant?

11:04AM

5 MR. SHERWOOD: Your Honor, we will not oppose
6 it, with that limitation.

7 THE COURT: Okay.

11:04AM

8 MR. SHERWOOD: I do want to just point out,
9 though, that I think this is somewhat connected also --
10 and I say this really just for the record, not for the
11 court to take any action on -- to Samsung's No. 14 that
12 you've already ruled upon where, in effect, Rembrandt is
13 saying, "Well, we would like to be able to talk about
14 Samsung's investments but we don't want you to talk about

11:04AM

15 who invested in Rembrandt." And I don't think -- so, in
16 other words, I guess what I'm saying is if they get into
17 a position where they start talking about Intellectual
18 Discovery or whatever it's called, No. 14, then I think
19 we should be able to talk about poker players, which I
20 assume we're not going to get to. But I think the two --
21 it's kind of talking out of both sides of your mouth as I
22 read this, your Honor. That's my only point.

11:05AM

23 THE COURT: Okay. Well, I'm not going to tie
24 those issues together but I understand that you might and
25 if you want to urge to the trial judge whatever you want

11:05AM

1 to, that's certainly up to you. But this ruling will
2 simply be that Motion in Limine No. 9 is granted as to
3 individuals with an ownership interest in Rembrandt.

11:05AM

4 Okay. The way I have handled No. 10 before,
5 Mr. Aycock, is to say that if you, the plaintiff, doesn't
6 open the door to this testimony by eliciting evidence
7 that Mr. Weinstein has been accepted as an expert by
8 other courts or by providing any details about his
9 testimony in other cases, then I will grant the motion

11:06AM

10 and prevent the defendant from eliciting evidence about
11 any cases in which his testimony may have been questioned
12 or limited.

13 MR. AYCOCK: We agree with that, your Honor.

14 THE COURT: All right. Then let me hear from

11:06AM

15 Samsung if they want to offer argument against that.

16 MS. HERMES: Yes, your Honor. Rebecca Hermes
17 for Samsung. Generally that's okay with us; but our

11:07AM

18 concern would be if Rembrandt were to open the door by
19 saying that Mr. Weinstein's testimony has been found
20 credible or given weight, especially here in the Eastern
21 District of Texas, that that would open the door to us
22 being able to impeach him with cases where his testimony
23 has been found unreliable or not based on proper
24 methodologies.

11:07AM

25 THE COURT: All right. I would agree with

1 that. I think the way you phrased that, if they
2 specifically elicit or argue that his testimony has been
3 accepted by this or other courts, that they would be
4 putting at issue the matters that you're wanting to get
5 in.

11:07AM

6 Mr. Aycock, do you understand that also?

7 MR. AYCOCK: Yes, your Honor. That's
8 acceptable. I just want to make sure that just the fact
9 that he has testified before, you know, sort of general
10 testimony of that nature wouldn't open the door.

11:08AM

11 THE COURT: The fact that he has testified
12 before does not run afoul of this. I think, you know, if
13 you go much further than that, then I think you run that
14 risk.

11:08AM

15 MR. AYCOCK: Yes, your Honor.

16 MR. JENNER: Your Honor, just one -- Jesse
17 Jenner. I'm sorry. One further narrow point here along
18 the line, we would be concerned -- I don't know if this
19 is going to be the case; but we would be concerned if
20 they implicitly create the problem by saying
21 Mr. Weinstein has testified numerous times before, dozens
22 of times before, scores of times before, something
23 numerical which would create the impression in the jury's
24 mind this must be some whiz-bang expert on this subject.

11:08AM

11:08AM

25 That would indirectly potentially create the same

1 problem, I submit.

2 MR. ALAVI: Your Honor, from our perspective,
3 we just want clarity. I think what Ms. Hermes talked
4 about makes sense. If we suggest that his testimony has
5 been accepted, juries have accepted his testimony, that
6 makes sense. Mr. Weinstein is an expert. That's what he
7 does for a living. What we don't want to be precluded
8 from doing is asking him, you know, "Where did you go to
9 school," "What job do you hold?"

10 "What do you do for a living?" "I'm an
11 expert."

12 "How long have you been an expert?" "I've
13 been an expert for 20 years."

14 That doesn't suggest that courts or juries
15 have found his testimony to be credible, therefore
16 opening the door. We have to be at least able to
17 demonstrate what he does for a living. And, so, I think
18 there is a nuance here where if you suggest by talking
19 about his experience that juries and courts have accepted
20 his testimony, that runs afoul of I think the policy
21 objective that you're trying to satisfy, your Honor; but
22 to suggest that we can't say that he has been testifying
23 as an expert, he's worked at this company for 20 years,
24 it means we can't talk about his background. I mean,
25 we're at least allowed to talk about his qualifications

1 and background so the jury understands he's not some guy
2 who just took this up yesterday.

3 MR. JENNER: Your Honor, I would not quarrel
4 with the way counsel is putting it because the way
11:10AM 5 counsel just put it doesn't get into my numerical
6 problem. The fact that he's testified many times, if
7 something numerical happens, even without saying it's
8 been accepted by a court, is to say implicitly it's been
9 accepted by a court because he's been allowed to do it 40
11:10AM 10 times.

11 If counsel is limiting the presentation to the
12 fact that he works in a certain place, he has testified
13 as an expert, and kind of limited to that and then goes
14 on, nothing of a numerical nature implying vast
11:11AM 15 acceptance comes up.

16 THE COURT: Well, the length of his
17 consultation experiences I think does involve a numerical
18 number; but I don't find that that in any way violates
19 this. So, I'm just going to say that they can talk about
11:11AM 20 the fact that he has testified previously and talk about
21 how long he's been doing it; but as long as there's no
22 numerical component or any reference to being accepted as
23 an expert by courts previously, then I don't consider
24 that they've opened the door.

11:11AM 25 MR. JENNER: Thank you, your Honor.

1 THE COURT: All right. Mr. Aycock, tell me
2 what it is you're seeking to exclude in No. 11.

3 MR. AYCOCK: So, for No. 11 we're seeking to
4 exclude references to royalties that allegedly might have
5 to be paid or other unidentified patents that would have
6 to be practiced to sell products that are compliant with
7 the Bluetooth + EDR specification. Relates to stacked
8 royalties or holdup.

9 And, your Honor, the Federal Circuit just
10 issued an opinion in December. This had to do with jury
11 instructions, but there they explained that the district
12 court doesn't need to instruct the jury on holdup or
13 stacking unless an accused infringer presents actual
14 evidence of holdup or stacking. That was the *Ericsson*
15 case.

16 Here there is no evidence. It's just a
17 theoretical concern about stacking of royalties.

18 THE COURT: Well, why isn't the testimony of
19 an expert about it evidence?

20 MR. AYCOCK: Well, in that case they were
21 talking about specific evidence rather than simply
22 conjecture about what might happen in the field; and here
23 we have something similar.

24 THE COURT: So, this is the *Ericsson versus*
25 *D-Link* case?

1 MR. AYCOCK: That's correct, your Honor.

2 THE COURT: And you're saying there the Fed
3 Circuit said that the district court did not err by
4 including certain jury instructions?

11:14AM

5 MR. AYCOCK: There they held the district
6 court -- that's right. The district court did not
7 include this instruction and it didn't err by not
8 including it. And we think that this would be -- it's
9 not relevant because there is no specific evidence of

11:14AM

10 stacking in this situation and we think that it would be
11 highly prejudicial because -- for Samsung to be allowed
12 to say that there are potentially thousands of patents
13 that they're going to have to pay for when there's no
14 actual evidence that there are other patents that apply.

11:14AM

15 THE COURT: Well, I mean, obviously one of the
16 ways that a manufacturer acquires licenses for its
17 products is through cross-licensing and lots of other
18 ways that would not involve a specific royalty for a
19 specific product.

11:15AM

20 Are you saying that Samsung can't tell the
21 jury in its analysis of the *Georgia-Pacific* factors that
22 there is lots of intellectual property involved in its
23 products?

11:15AM

24 MR. AYCOCK: Well, your Honor, there is
25 another Motion in Limine No. 16 that relates to what

1 you're referring to. It's the RAND Zero policy or
2 license, and we have also moved to exclude that evidence
3 as well.

11:15AM

4 THE COURT: If all you're relying on is the
5 *Ericsson* case to argue that the defendant has a burden of
6 putting on certain evidence before it can include in its
7 damages analysis a royalty stacking argument, then I
8 don't think the *Ericsson* case gives you what you're
9 trying to get.

11:16AM

10 Do you have any other case that says that?
11 Because I see this as part of every damage analysis we
12 do.

11:16AM

13 MR. AYCOCK: I think that the *Ericsson* case is
14 the first case where the Federal Circuit has addressed
15 stacking; but here, your Honor, there just -- there are
16 no other specific patents that Samsung has pointed to.
17 So, we think to raise this as a general issue and point
18 to potentially thousands of other patents is prejudicial
19 to Rembrandt.

11:16AM

20 THE COURT: Okay. I'm going to deny No. 11.
21 I don't think there's an adequate foundation established
22 for that.

11:17AM

23 No. 12 does not appear to be opposed as far as
24 the reference to fees other than for a testifying
25 witness.

1 MR. ENGER: Your Honor, that was my reading as
2 well. Since counsel is not going to be a testifying
3 witness in this case, it seems like that's a distinction
4 without a difference and that your Honor should grant
5 this MIL.

11:17AM

6 THE COURT: And obviously this MIL would not
7 apply to any witness who does testify, whether they're
8 counsel or otherwise, right? If they have a financial
9 interest in the case, the defendant is free to point that
10 out.

11:18AM

11 MR. ENGER: That's fair, your Honor.

12 THE COURT: All right. With that
13 understanding, Mr. Sherwood, do you have any opposition
14 to this MIL?

11:18AM

15 MR. SHERWOOD: Not with that understanding,
16 your Honor. In other words, with that limitation the
17 court has just articulated, I don't have any opposition.

18 THE COURT: All right. And basically what it
19 would apply to, then, is the contingent fee interest of
20 counsel in the case, is I guess would be what's left.

11:18AM

21 MR. SHERWOOD: Well, your Honor, that I'm not
22 quite sure about. There may be a witness who works for
23 Rembrandt who might have a financial interest in the
24 outcome. So, I'd just point out that's a possibility.

11:18AM

25 THE COURT: Yeah. I'm just saying what is

1 being excluded is references to basically the contingent
2 fee interest of counsel because anybody who testifies,
3 their financial interest, whatever its nature may be, is
4 fair game.

11:19AM

5 MR. SHERWOOD: Correct. And I just, again,
6 for the interest of clarity, as we've discussed, wanted
7 to make that statement so that you'd know about it.

8 THE COURT: And I appreciate that. That's a
9 good approach.

11:19AM

10 Okay. All right, Mr. Enger. What's next?

11 MR. ENGER: Your Honor, Motion in Limine
12 No. 13 prohibits Samsung from introducing evidence or
13 argument that awarding Rembrandt damages would drive up
14 the prices of Samsung's products or cause Samsung to lay
15 off employees. Again, that evidence would be irrelevant
16 and unduly prejudicial. Again, I don't see the beef
17 here.

11:19AM

18 In response, Samsung says that it does not
19 oppose this MIL with respect to testimony that a damages
20 award would negatively impact Samsung's employees or
21 customers. That seems like they've agreed to it. They
22 introduce some other information about introducing
23 evidence that Rembrandt's requested royalty rate is
24 disproportionate and that it may affect Samsung's chip
25 purchasing decisions and profitability. Again, those are

11:19AM

11:20AM

1 outside the scope of this MIL.

2 THE COURT: All right. And I think that the
3 reason they made the concession they made about
4 negatively impacting employees or customers is because
5 that's what was ruled in a previous case. But I think
6 that what you have agreed to is fine for this case.

11:20AM

7 Ms. Hermes, is that -- you're agreeing that
8 there won't be any argument that a damage award in this
9 case would endanger your company or negatively impact
10 employees or customers? Is that --

11:21AM

11 MS. HERMES: Correct. We just wanted to make
12 sure that we still can cross-examine Mr. Weinstein on
13 certain assumptions he made in his analysis and how that
14 would affect the hypothetical negotiation in terms of
15 Samsung looking at the profitability of its products or
16 its purchasing decisions with third-party chip suppliers.

11:21AM

17 THE COURT: Okay. Well, as long as he doesn't
18 raise the specter that a certain damage award in this
19 case would threaten the financial viability of Samsung or
20 negatively impact employees or customers, then you will
21 have no problem with this ruling.

11:21AM

22 MS. HERMES: Yes, your Honor.

23 THE COURT: Okay. As to 14, Mr. Enger,
24 what -- what's the issue that you're after there?

11:22AM

25 MR. ENGER: Your Honor, this limine motion

1 basically prohibits Samsung from taking back the binding
2 admissions that were taken during depositions of
3 Samsung's corporate representatives; and this is limited
4 to the subjects for which they were actually properly
5 designated.

11:22AM

6 THE COURT: Why isn't this just something that
7 should be left for impeachment? If you think they have
8 contradicted the testimony of a corporate representative,
9 why isn't your remedy to impeach them with that?

11:23AM

10 MR. ENGER: Well, your Honor, I think that
11 would be one option; but the better solution would be not
12 to let them do that in the first place. And the reason
13 being is because when you look at the text of
14 Rule 30(b)(6), it says that you're bound by the
15 admissions of your corporate representatives.

11:23AM

16 THE COURT: I understand that. But how is
17 making that an in limine ruling -- how does that help
18 anything?

19 MR. ENGER: Well, it prohibits Samsung from
20 even trying in the first place to take back those
21 admissions, which, you know, once you've rung the bell,
22 it's tough to unring it. Can't put that cat back in the
23 bag.

11:23AM

24 THE COURT: I think that's what impeachment is
25 all about.

11:23AM

1 You know, if you think that you need an
2 instruction to the jury that certain testimony was -- or
3 should be considered by the jury to be binding, which
4 would only come up if you impeached a witness, and then
11:24AM 5 Samsung says that that prior testimony shouldn't be
6 binding, but I -- you know, I think that's something you
7 can take up with the judge if you think that you need
8 some kind of limiting instruction to the jury but this to
9 me is in the nature of a limine ruling that just says
11:24AM 10 "follow the rules" and I stay away from those because I
11 don't think they help. So, I'm going to deny this one.
12 Not because I disagree with the gist of it but because I
13 don't believe it's helpful.

14 MR. ENGER: Thank you, your Honor.

11:24AM 15 THE COURT: The same thing I think is true of
16 15, unless you can point out some difference.

17 MR. ENGER: Well, some background might be
18 helpful, your Honor. Samsung submitted 30(b)(6) notices
19 that included kind of two broad categories of topics,
11:25AM 20 damages topics and technical topics. We presented
21 Dr. Paul Schneck on the technical topics and Mr. Derek
22 Wood on the damages topics.

23 The problem was during the technical
24 deposition, which should have been all about technical
11:25AM 25 topics, the entirety of the deposition was spent on

1 damages issues. So, our corporate representative
2 basically punted and said, "I'm not the guy that knows
3 about that. Talk to Mr. Wood. I have not been
4 designated to speak on behalf of the company about that."

11:25AM

5 Now, the problem with this is on
6 cross-examination -- or I'm sorry -- yeah,
7 cross-examination, they can use this type of information
8 and these type of answers to the questions where he's
9 punting to Mr. Wood to make the witness look very

11:25AM

10 unknowledgeable; and in fact he wasn't supposed to be
11 knowledgeable about those topics. It was outside the
12 scope. It's prejudicial, your Honor.

11:25AM

13 THE COURT: Well, that -- I don't see any
14 reference to that in your motion. If that's what this is
15 all about --

16 MR. ENGER: I can give you some examples of
17 the testimony that we're exactly afraid of, your Honor.

18 THE COURT: I mean, this is all relating to
19 the testimony of one witness?

11:26AM

20 MR. ENGER: Yes, your Honor.

21 THE COURT: Well, I guess my problem is that
22 that issue has not been presented very well. Typically
23 whether a question is outside the scope of the deposition
24 notice is going to have to be taken up on a

11:26AM

25 question-by-question basis.

1 MR. ENGER: I think this is a very narrow
2 limine motion, your Honor. I think it's -- it's highly
3 prejudicial, you know, being able to impeach Dr. Schneck
4 on damages testimony for which he was not the corporate
11:26AM 5 representative, make him look like he's unknowledgeable
6 whenever he was not, again, the corporate representative
7 on those topics. He didn't need to be knowledgeable, in
8 other words.

9 THE COURT: And this is Dr. Schneck?

11:27AM 10 MR. ENGER: Dr. Paul Schneck, S-C-H-N-E-C-K.

11 THE COURT: All right. Let me hear from the
12 defendant about Dr. Schneck.

13 MS. HIGGINS: Your Honor, as you point out,
14 the motion itself is vague and overbroad; and even if
11:27AM 15 we're talking specifically about the testimony from
16 Dr. Schneck, Rembrandt's counsel is still asking for a
17 blanket rule here with respect to his testimony. We
18 submit that this is something that is very difficult to
19 do with respect to and as you've said -- as you've
11:27AM 20 pointed out, your Honor, should be taken up on a
21 case-by-case basis if it even comes up. If the witness
22 is asked a question and the answer is "I don't know,"
23 then frankly there's no need to impeach the witness.

24 We also -- I think that this is just not the
11:28AM 25 proper subject of a MIL. It's a request for mandatory

1 relief; and once again, you know, we believe this is a
2 situation where the parties ought to be able to follow
3 the federal rules.

4 THE COURT: And, Ms. Higgins, I do not intend
11:28AM 5 to grant this motion as broadly written; but if there's
6 an issue lurking about Dr. Schneck that is going to come
7 up during the trial, then I would like to see if there's
8 a way to reach that before trial.

9 MS. HIGGINS: Your Honor, if, for example,
11:28AM 10 Dr. Schneck at trial -- this is classic impeachment
11 scenario. If Dr. Schneck at trial is asked a question
12 and all of a sudden his memory is better and he can
13 answer the question, you know, that's a situation where
14 we should be able to impeach him with the fact that he
11:29AM 15 said at his deposition "I don't know." That's proper
16 impeachment. And, so, once again, I think a blanket rule
17 here is improper.

18 THE COURT: Well, if Dr. Schneck was asked
19 questions at his deposition and the deposition was just a
11:29AM 20 30(b)(6) deposition and the topics in that 30(b)(6)
21 deposition did not include the subject about which he was
22 questioned, then the fact that he didn't know at that
23 time would not impeach his later knowing if he testifies
24 as a corporate representative at trial. And, so, I guess
11:30AM 25 what I'm struggling with is that there may be a series of

1 questions that he was asked at his 30(b)(6) deposition to
2 which objection should have been made.

3 Mr. Enger, was there a contemporaneous
4 objection about those questions being beyond the scope of
5 the deposition notice?

11:30AM

6 MR. ENGER: Yes, your Honor. I objected to
7 that numerous occasions, and I also got a running
8 standing objection at the beginning of the deposition
9 whenever it became apparent what the tactic was going to
10 be.

11:30AM

11 MS. HIGGINS: But still, your Honor, you know,
12 dealing with this in the hypothetical as opposed to a
13 specific instance with a specific question and answer, I
14 think it's difficult.

11:31AM

15 THE COURT: Well, I guess the only way it
16 occurs to me it might be helpful is if the plaintiff has
17 a series of questions that Dr. Schneck was asked at his
18 30(b)(6) deposition as to which a contemporaneous
19 objection was made, then I'm willing to rule on those
20 objections with an eye toward whether that testimony will
21 be allowed to be used even to impeach Dr. Schneck. In
22 other words, if it was beyond the scope of the deposition
23 notice and that objection was made at the time, then I
24 think they're entitled to a ruling on that and that
25 testimony would not be available to impeach him.

11:31AM

11:31AM

1 So, what I'm going to say on this is I'm going
2 to deny this motion in limine; but I'm going to instruct
3 counsel to meet and confer about the use of Dr. Schneck's
4 deposition. And if you're able to work it out, fine. If
5 not, then I want the plaintiff to file a supplemental
6 motion in limine that will be filed in time to be taken
7 up at our next hearing before trial.

11:32AM

8 Mr. Enger, how soon do you think you can
9 accomplish meeting and conferring with the other side and
10 raising that issue in any supplemental motion?

11:32AM

11 MR. ENGER: I certainly think we could meet
12 and confer this week. In terms of getting the motion
13 filed, early next week seems reasonable.

14 THE COURT: Okay.

11:33AM

15 MS. HIGGINS: And, your Honor, if I may, it
16 might be helpful to know whether plaintiff's counsel
17 plans to call Mr. Schneck for topics outside of his
18 30(b)(6) testimony.

19 MR. ANAIPAKOS: We anticipate calling
20 Dr. Schneck, your Honor, on a variety of topics; and we
21 do anticipate some of those will be outside the scope of
22 his 30(b)(6) designation. That's the purpose for the
23 motion in limine.

11:33AM

24 THE COURT: All right. Well, that means it's
25 still a live issue, I guess, so...

11:33AM

1 MS. HIGGINS: Your Honor, if I may, it's very
2 difficult, if we don't know what the testimony is at the
3 time of trial, to know whether or not we -- you know. We
4 believe the right to impeach or at least discuss that on
5 a case-by-case basis here is important.

11:34AM

6 THE COURT: Well, on what basis would you be
7 allowed to use an answer that was beyond the scope of the
8 deposition notice when you got a timely objection?

9 MS. HIGGINS: Your Honor, as I said, I think
10 it's very case-by-case specific; and I think that having
11 to review the specific testimony from the deposition of
12 Mr. Schneck versus the testimony that he's offering on
13 the stand is really the only way that you could resolve
14 that issue. And I don't have a specific example in mind.

11:34AM

15 THE COURT: Well, I guess what I'm saying is
16 how would you be entitled to use it if you asked the
17 question in violation of the scope of your notice and
18 that was timely pointed out? Under what theory would you
19 use that testimony?

11:34AM

20 MS. HIGGINS: Well, for example, Mr. Schneck
21 is the CEO of Rembrandt and there might be certain
22 factual information that is within the scope of what the
23 man knows and if he did not answer questions that were
24 outside the scope of the deposition -- and there was also
25 the issue of whether those -- that testimony and the

11:35AM

11:35AM

1 question was indeed outside the scope. And I think
2 unless you're looking at the specifics of the question
3 and answer and counsel's objection, we don't even know
4 for sure that the objection itself is meritorious. So,
5 I --

11:35AM

6 THE COURT: I agree. That's the matter we
7 would be taking up at the next hearing.

8 MR. ENGER: Your Honor, whenever you really
9 get down to it, this is a very simple issue. He was
10 designated on technical topics, things like inception,
11 reduction to practice, prosecution. He was not --
12 99 percent of the deposition was about the corporate
13 structure, what's their business model, how much did they
14 acquire the patents for, things of that nature, which he
15 said "I don't know" after being instructed -- I'm
16 sorry -- after an objection that that was outside the
17 scope.

11:36AM

11:36AM

18 Now if he comes to trial and he testifies in
19 his personal capacity, not as a 30(b)(6) witness, he
20 shouldn't be impeached for saying "I don't know the
21 answer."

11:36AM

22 THE COURT: I understand the theory. And to
23 the extent that the point Ms. Higgins is making is that
24 we should look at the context of the answer and the
25 notice, I agree with all that. I'm just saying I don't

11:36AM

1 want to leave that for the trial judge to have to take up
2 cold with the jury in the box. So, I'm going to allow
3 Mr. Enger until some date next week. And I guess the
4 earlier the better.

11:37AM

5 How about if we say you're to file that by
6 next Monday, Mr. Enger?

7 MR. ENGER: That's acceptable, your Honor.

8 THE COURT: Okay.

9 MR. ENGER: Providing we can have a timely
10 meet and confer.

11:37AM

11 THE COURT: And we can gather back here on
12 Monday the 2nd for a hearing on it. And the defendant
13 can file its response -- if you get it on Monday, file
14 your response by -- Ms. Higgins, do you think by midnight
15 Thursday? Basically three days. Can you handle that?

11:38AM

16 MS. HIGGINS: Yes, your Honor.

17 THE COURT: And then we will gather here on
18 the 2nd -- on, say, the morning of the 2nd to take that
19 up.

11:38AM

20 MS. HIGGINS: Thank you, your Honor.

21 THE COURT: All right. Thank you.

22 But the motion in limine itself is denied on
23 the theory that it's just overbroad.

24 All right. Tell me about No. 16, Mr. Aycock.

11:39AM

25 MR. AYCOCK: Your Honor, No. 16 we referred to

1 earlier when we were talking about Motion in Limine
2 No. 11. And here we're seeking to exclude evidence and
3 arguments related to the RAND Zero policy and license,
4 and this is -- there is an industry group, the Bluetooth
5 SIG, that has a -- essentially a cross-license, just like
6 as your Honor alluded to earlier; and here we're seeking
7 to exclude this information.

11:39AM

8 There's no dispute that Rembrandt and Summit
9 were never Bluetooth SIG members and they don't have an
10 obligation under that policy or license. And we think
11 that the fact that Samsung and other entities have
12 entered into royalty-free licenses has nothing to do with
13 the value of the patents at issue here, and we think that
14 that's only prejudicial because it suggests that the
15 value is nothing.

11:39AM

11:40AM

16 THE COURT: All right.

17 MS. HERMES: As Rembrandt noted, Samsung is a
18 member of the Bluetooth SIG working group and is aware
19 of -- and was aware at the time of the hypothetical
20 negotiation -- of the existence of the royalty-free
21 cross-licensing. I think that would have been a factor
22 they would have considered at the time of the
23 hypothetical negotiation when they were sitting down with
24 Rembrandt.

11:40AM

11:40AM

25 Further, the accused EDR functionality in this

1 case is an optional feature of the Bluetooth standard and
2 as such would clearly have been in Samsung's mind when it
3 was thinking about licensing this technology. We think
4 it's relevant background information for damages. We
5 think it's relevant to *Georgia-Pacific* Factor 8. It goes
6 to the profitability of the products, as well as
7 Factor 15, the hypothetical negotiation. That's it.

8 THE COURT: All right. Thank you, Ms. Hermes.

9 MR. AYCOCK: If I may respond, your Honor.

10 THE COURT: Mr. Aycock, do you have any
11 authority dealing with exclusion of this particular kind
12 of evidence?

13 MR. AYCOCK: I don't, your Honor.

14 THE COURT: I don't see why this is not fair
15 game for the experts to testify about.

16 MR. AYCOCK: Well, your Honor, I believe that
17 Samsung has repeatedly asserted that it's relevant to the
18 hypothetical negotiation without actually explaining why.
19 Why the fact that they have entered into licenses that
20 are royalty-free with other entities related to other
21 aspects of the Bluetooth standard has anything to do with
22 the value of this particular patent. They've asserted
23 it, but they've never explained why there's any
24 relationship there.

25 THE COURT: Well, I think that's something

1 that is best left to the testimony of the experts and the
2 cross-examination of them. I'll deny No. 16.

3 MR. ENGER: Your Honor, Motion in Limine
4 No. 17 prohibits Samsung from arguing that some claim
11:42AM 5 elements are more important than others. I think the law
6 is clear that the claims define the invention as a whole
7 and any argument that some claim elements are more
8 important than others is improper. I understand this is
9 a relatively common limine motion that's been granted in
10 the Eastern District on other occasions.

11 What we're afraid of and what we don't want to
12 happen is Samsung's invalidity expert shouldn't be
13 permitted to say that some missing limitation is
14 unimportant and therefore you don't have to -- pay it
11:43AM 15 little mind whenever you're assessing invalidity. That's
16 what this all boils down to.

17 THE COURT: All right.

18 MR. HADDAD: Gerard Haddad for Samsung, your
19 Honor. Your Honor, Rembrandt's motion doesn't identify
11:43AM 20 with any specificity the evidence it seeks to exclude
21 other than a very general reference; and the only law
22 Rembrandt cites is a cropped portion of a citation to the
23 *Hilton Davis* case, your Honor, where --

24 THE COURT: Well, tell me: Do you intend to
11:44AM 25 elicit any such testimony? I'm not -- I would be

1 surprised if you're going to have your infringement
2 expert testify that a certain limitation doesn't matter.

3 MR. HADDAD: Your Honor, I'm not sure what
4 limitation that they might be referencing. I don't know
5 of any particular limitation where he says one is less
6 important than the other. If there were -- if there was
7 something like that, I think it should be brought to our
8 attention so I could look at it and think about it.

9 THE COURT: Well, Mr. Enger, whether something
10 is -- has been granted in other cases or not as an in
11 limine ruling doesn't really tell me much because often
12 it's something by agreement or otherwise. I just don't
13 want to grant in limine rulings that I don't fully
14 understand because I think that just creates mischief.

15 What -- everybody knows the law is that the
16 device or system or whatever it is that is accused will
17 have to meet all of the limitations of the claim.

18 MR. ENGER: Your Honor, let me give you an
19 example. Our claims have a number of limitations. One
20 of the limitations is this master/slave protocol. What I
21 don't want to have happen, for example, is Samsung's
22 invalidity expert to get up there and say, "Yeah, I know
23 that the master/slave protocol isn't present; but that's
24 unimportant. That doesn't really get to the heart of
25 this invention. Therefore, it's not really important

1 that it's not found in this prior art reference." That's
2 the type of argument we're seeking to prohibit.

3 THE COURT: Mr. Enger, you should hope that
4 they testify that way. I -- do you have some reason to
5 expect that in this case, from the report or deposition
6 of their expert?

7 MR. ENGER: Your Honor, the way that they
8 framed the invention really downplays this master/slave
9 notion and really up-plays other aspects of the invention
10 that are found in other limitations, which is their
11 prerogative to explain it that way but not to suggest
12 that certain limitations are more important than others.

13 THE COURT: I am going to deny that. I think
14 that's something you can address in jury instructions.
15 If you believe that the defendant has tried to give the
16 jury a false impression about what the law is regarding
17 infringement, that's something that I think should be
18 argued to the court and cleared up in jury instructions.
19 And I think that the jury instructions, even the
20 preliminary instructions, will be clear that each of the
21 limitations of the claim must be met. But in any event,
22 I'm going to deny that.

23 18. I understand from the briefing that the
24 parties are in agreement that there will be no reference
25 to the fact that certain claims are not being asserted in

1 the case but that that will have no effect on the
2 defendants' ability to go through the prosecution history
3 and talk about what changes were made or what discussions
4 there were about the claims during the prosecution
5 history. Is that --

11:47AM

6 MR. ENGER: Your Honor, we don't believe that
7 falls within the scope of this MIL.

8 THE COURT: Okay. Well, Mr. Haddad, tell me
9 if you understand this differently.

11:48AM

10 MR. HADDAD: Your Honor, we agree not to
11 present evidence or elicit testimony regarding the fact
12 that Rembrandt narrowed the list of claims that it
13 intends to assert in this litigation; but Samsung
14 shouldn't be precluded from presenting evidence relating
15 to, for example, its marking defense, factual -- factual
16 evidence relating to the prosecution.

11:48AM

17 So, for example, your Honor, during
18 prosecution he -- just last month, part of the
19 prosecution record is that Rembrandt disclaimed several
20 claims in two filings with the patent office; and that
21 should be part of what we can elicit because that's
22 relevant to the prosecution record, like all the other
23 facts of the prosecution record, your Honor.

11:48AM

24 THE COURT: I think that I can say with
25 confidence that that evidence would not violate this

11:48AM

1 order.

2 MR. HADDAD: Thank you, your Honor.

3 THE COURT: Whether or not it's otherwise
4 admissible is a different issue that I'm not addressing,
5 but this has no effect on the evidence of the prosecution
6 history before the PTO.

7 MR. HADDAD: Okay.

8 THE COURT: If that -- just to use the word
9 "prosecution" that way. The prosecution of this lawsuit
10 is what we're talking about not allowing, but prosecution
11 history before the PTO is not implicated by this ruling.

12 MR. HADDAD: Thank you, your Honor.

13 THE COURT: Okay. All right, Mr. Enger.
14 What's next?

15 MR. ENGER: Am I understanding that you're
16 granting MIL 18?

17 THE COURT: Yes, as to the fact that the
18 plaintiff has narrowed the claims asserted during this
19 litigation.

20 MR. ENGER: Understood.

21 MIL 19 is about products and third parties
22 that are not accused of infringement. I think there
23 might be a disagreement -- or a misunderstanding between
24 the parties about the scope of this motion in limine. It
25 really only prohibits Samsung from introducing evidence

1 or argument suggesting that products or parties not
2 accused of infringement did not infringe, as that would
3 not -- be improper and would be confusing to the jury.
4 MIL 19 does not prohibit the mere mention of any third
5 party or products, including BlackBerry. It just
6 prohibits Samsung from inferring that there are a whole
7 host of non-infringing products available by virtue of
8 the fact that Rembrandt didn't sue them in this
9 litigation.

11:50AM

10 Samsung agrees to this MIL and the scope
11 intended. In their response, they say they agree not to
12 elicit any testimony that a product or party not accused
13 of infringement in this case does not mean such products
14 or parties do not infringe the patents-in-suit.

11:50AM

15 THE COURT: And that would be not to elicit
16 testimony and not to argue to the jury the fact that some
17 product was not sued means that --

11:50AM

18 MR. ENGER: It doesn't infringe.

19 THE COURT: -- it doesn't infringe.

20 MR. ENGER: Yes, your Honor.

11:51AM

21 THE COURT: And that's the understanding that
22 the defendants have of this as well?

23 MR. SHERWOOD: Yes, your Honor, I think that's
24 correct.

11:51AM

25 THE COURT: All right. Then that -- it will

1 be granted to that extent.

2 All right.

3 MR. ENGER: Your Honor, Limine Motions No. 20
4 and 21 I think are related, and perhaps it makes sense to
5 discuss those together. Those motions prohibit Samsung
6 from introducing evidence or argument about privileged
7 subject matter and asking questions that attempt to
8 elicit privileged subject matter. Those privileged
9 matters are not discoverable and forcing Rembrandt to
10 object in front of the jury every time a privilege issue
11 arises would cause undue prejudice.

12 From reading the response, I don't think
13 Samsung really disputes that privileged matters are
14 off-limits; but basically their dispute is this motion
15 in limine is just too vague. Not so, your Honor. The
16 parties have engaged in extensive discovery, and the
17 lines are clear about what matters are considered
18 privileged and what matters are not. And I have a list
19 of examples that, you know, from the deposition
20 testimony, should be very clear what we consider to be
21 privileged and why we shouldn't have to get up and object
22 that they're seeking information on privileged matters.

23 The bottom line, as we see it, is if a topic
24 drew a privilege objection during deposition such that
25 Samsung knows Rembrandt considers that topic privileged,

1 Samsung should have to ask the court's permission before
2 presenting evidence on that topic or asking questions
3 about that topic during trial.

4 THE COURT: All right.

11:53AM

5 MS. BIANROSA: Your Honor, Samsung maintains
6 that Rembrandt's motions in limine are vague. There's no
7 specific testimony that they cite in here that they're
8 specifically objecting to. Samsung is not going to be
9 asking any questions to a witness such as "What did you

11:53AM

10 say to your lawyer" or "What did your lawyer say to you";
11 but there are certain questions that normal businesses
12 could answer about the nature of their business that
13 Rembrandt won't answer because of the nature of

11:53AM

14 Rembrandt's business and they're claiming privilege more
15 broadly than a normal business would. And the fact that
16 Rembrandt is in the license and litigation business is --
17 shouldn't preclude Samsung from being allowed to ask the
18 same questions that it could ask any other business.

11:53AM

19 THE COURT: And I guess, Ms. BianRosa, I think
20 what we're talking about here is if you're on notice that
21 the plaintiff has asserted a privilege to something, then
22 should you be ordered not to go into that in the presence
23 of the jury without approaching the court first. That's
24 really the way I understand this. And I think it would

11:54AM

25 apply both ways, frankly.

1 But if you know that they have previously
2 asserted a privilege as to that, why shouldn't that be
3 something that is off-limits unless you get leave of
4 court on an approaching-the-bench basis?

11:54AM

5 MS. BIANROSA: Well, your Honor, I think it's
6 just that the way it is outlined in Rembrandt's motions,
7 it's just too broad right now. We really do need a list
8 as to what they are asserting privilege over. Otherwise,
9 it's just really too broad.

11:54AM

10 THE COURT: Well, the way I was contemplating
11 this was that it wouldn't be what they intend to assert
12 privilege as to but only what they have already asserted
13 is privileged. So, you would be on notice of that.

11:55AM

14 Is there -- I just -- I don't think that they
15 should have to reassert the privilege in front of the
16 jury if they've already asserted it before trial as to
17 something. And if you're -- if you can point out to me
18 how that would create a hardship for you, then I want to
19 try and accommodate that.

11:55AM

20 MS. BIANROSA: Well, I think, again, your
21 Honor, this also goes to, like in one of the previous
22 MILs, that -- the propriety of any of those privilege
23 assertions and whether or not we should have to follow
24 them. So, I think that some of these things will need to
25 be gone through on a question-by-question basis here as

11:55AM

1 well.

2 THE COURT: Well, the privilege would have
3 been asserted during discovery; and I assume if you think
4 that a privilege was improperly asserted during
5 discovery, you have the vehicle of a motion to compel to
6 bring that up. If you haven't done that and you still
7 want to challenge it, then I'm sure there are other
8 procedural vehicles that you can use; but one of them
9 should not be just bringing it up in front of the jury
10 and causing the court to have to address a privilege
11 objection that you already know about in that way.

12 Are you concerned that there are some
13 privilege defenses that they've asserted that you intend
14 to attack at the trial?

15 MS. BIANROSA: No, I don't think we have
16 anything specific in mind, your Honor. I think it's just
17 that we haven't received the universe of what Rembrandt
18 thinks that we're going to go through at trial and what
19 they're objecting to, and it's -- it really places the
20 burden on us to go through all the deposition transcripts
21 and look for any privilege objection and tailor our
22 questioning around that.

23 THE COURT: Well, all I'm going to say is that
24 if you are aware of a privilege objection as to
25 something, then you should not raise it in front of the

1 jury without getting some ruling from the court out of
2 the presence of the jury. You know, frankly, even the
3 morning before court starts would be preferable but --
4 and obviously it may come up that there's something you
5 did not realize they had asserted a privilege to and that
6 would be unfortunate, but it happens.

11:57AM

7 But to the extent you know they have claimed a
8 privilege as to certain evidence, then don't present that
9 evidence without raising it with the court out of the
10 presence of the jury. So, I guess I'm granting 20 and 21
11 to that extent. And that applies to both sides.

11:58AM

12 All right. No. 22.

13 MR. ENGER: Your Honor, Limine Motion 22
14 prohibits Samsung from parading before the jury

11:59AM

15 Rembrandt's ties to Texas or lack thereof so as to
16 suggest that Rembrandt is abusing the court system by
17 filing this lawsuit in Marshall or otherwise wasting the
18 Texas jurors' time. Again, we don't believe that that
19 evidence has any probative value and unduly prejudices
20 Rembrandt.

11:59AM

21 From reading the response, I don't see that
22 there's a big beef about this. They say they will not
23 present arguments or evidence to suggest Rembrandt filed
24 this lawsuit in Marshall, Texas, for an improper or
25 underhanded purpose but they instead merely seek

11:59AM

1 permission to ask Rembrandt's witnesses about background
2 issues such as where they work.

3 THE COURT: You know, and I guess I see this
4 as related also to a motion that the defendant has filed,
5 a motion in limine regarding the fact that Samsung is a
6 foreign company based in Korea and --

7 MR. ENGER: I see parallels as well, your
8 Honor.

9 THE COURT: And I would assume that you're
10 going to abide by the same restrictions that you're
11 seeking from them, that you're not going to seek to draw
12 attention to that or emphasize that.

13 MR. ENGER: No, your Honor. As their MIL is
14 written, it prohibits us from even mentioning they're
15 from Korea. That goes too far. But for us to make that
16 a trial theme and suggest some sort of a nativist, you
17 know, because they're from Korea and we're a United
18 States company, that's a problem; but we will not be
19 making any of those types of arguments. But the issue
20 that they are Korean, you know, in the appropriate tone
21 and the appropriate time for the damage analysis is
22 necessary.

23 THE COURT: Well, I think that the court's
24 intention is to restrict both sides from arguments about
25 where the parties are located. Certainly you can draw

12:01PM

1 out any factual evidence about the -- where any
2 particular witness lives or works, but there shouldn't be
3 any argument that Rembrandt has no connection to Texas or
4 that Samsung is a foreign or Korean company and that that
5 has anything to do with the issues in the case. And as
6 long as both sides abide by that, then I don't expect
7 there will be any trouble.

12:01PM

8 MR. ENGER: Just a little clarification, your
9 Honor. Are you saying that we're not allowed to mention
10 that Samsung is from Korea?

11 THE COURT: No. You're allowed to mention
12 that where relevant.

13 MR. ENGER: I see. But not to make any sort
14 of nativist arguments.

12:01PM

15 THE COURT: Not to -- to use it in a way that
16 is not relevant to whatever you're talking about.

17 MR. ENGER: Understood.

18 THE COURT: All right. Does the defendant
19 need any clarification on that issue? Ms. Hermes?

12:02PM

20 MS. HERMES: With regards to Rembrandt, I
21 think we're in agreement. We would only think that that
22 would be relevant if they were to present to the jury
23 some ties to Texas, that we would be able to

12:02PM

24 cross-examine on that topic only if they opened the door
25 by saying that they have a strong presence in Texas or

1 something of that nature.

2 With regard to Samsung's foreign status, we
3 are obviously -- we feel like what they've said doesn't
4 draw a very distinct line in terms of what they're going
5 to say about Samsung being a foreign corporation. We
6 think that that fact is of no consequence under the
7 patent laws and is more prejudicial to Samsung to paint
8 them as a foreign corporation than to say that Rembrandt
9 is from Pennsylvania, for example.

10 THE COURT: Well, I agree. I do think that
11 there are points in the case where it will be relevant to
12 have testimony or argument about where Samsung is from;
13 but if the plaintiffs are making arguments that are not
14 based on the relevance of it, then that's something that
15 you can take up with the trial judge and that I can
16 expect the plaintiff to desist from.

17 Anyway, I think that we're as clear as we can
18 be on that; and I -- more than that I don't know that we
19 can put out at this time. But I don't think there's any
20 doubt but that the members of the jury will know that
21 Samsung is a foreign corporation, but I just don't expect
22 the plaintiff to base arguments on that.

23 Okay. Then I'll show that No. 22 is granted
24 except to the extent of facts regarding where particular
25 witnesses or -- where particular witnesses are located.

1 And I guess -- I don't know. Do I need to make it any
2 broader than that for --

12:04PM

3 Ms. Hermes, do you -- is there anything other
4 than that that you're interested in being able to put on
5 about the defendants -- the plaintiff?

6 MS. HERMES: Only if the plaintiff were to
7 open the door by suggesting that they have had contacts
8 with Texas.

9 THE COURT: That you don't think they do.

12:04PM

10 MS. HERMES: Correct.

11 THE COURT: All right. Tell me about No. 23,
12 Mr. Enger.

13 MR. ENGER: Yes, your Honor. This is about a
14 defense of practicing the prior art. We don't think
15 Samsung should be allowed to introduce evidence or
16 present arguments comparing the accused devices to the
17 prior art because there is no practicing prior art
18 defense to infringement.

12:05PM

19 Again this doesn't seem disputed. Seems like
20 it should have been agreed to. They agree not to present
21 a practicing prior art defense but want to present
22 evidence pertaining to its invalidity defense. I guess,
23 your Honor, so long as Samsung is comparing the claims to
24 prior art and not the infringing Bluetooth products to
25 the prior art -- that would be improper -- Samsung is not

12:05PM

1 going to run afoul of this MIL.

2 THE COURT: I mean, all I see reserved in the
3 opposition is the right to present prior art to show
4 anticipation, if I'm reading that right.

12:06PM

5 MR. HADDAD: Yes, your Honor.

6 THE COURT: Okay. Well, I will show then that
7 this motion is granted to the extent of the -- any
8 argument that they're not infringing because they're
9 practicing the prior art but does not in any way impair
10 their right to present their invalidity defense based on
11 anticipation.

12:06PM

12 MR. HADDAD: Or obviousness, your Honor.

13 THE COURT: Okay. Or obviousness. Thank you.

14 MR. HADDAD: Thank you.

12:07PM

15 THE COURT: All right. Mr. Enger, what's
16 next?

17 MR. LARSON: It's actually Mr. Larson, your
18 Honor.

19 THE COURT: All right. Mr. Larson.

12:07PM

20 MR. LARSON: This next MIL is to exclude
21 references to prior art that were not properly included
22 in Samsung's original invalidity contentions. Now, we
23 filed a motion to strike portions of Dr. Goodman's
24 invalidity report, which is Docket No. 165, that are
25 related to this MIL, your Honor. So, I'm happy to

12:07PM

1 present argument on that motion, on the motion to strike;
2 but I believe the motion to strike will take care of this
3 motion in limine.

4 THE COURT: All right. Then what I would
5 intend to do is just carry this motion to be taken up in
6 connection with the motion to strike the expert's
7 testimony.

8 Does that appear likely to handle all the
9 issues in it, Mr. Haddad?

10 MR. HADDAD: We agree, your Honor. Thank you.

11 THE COURT: Okay. And as I understand it, 25
12 is granted by agreement.

13 MR. ENGER: That's correct, your Honor.

14 THE COURT: Okay. All right. That takes care
15 of plaintiff's motions in limine.

16 Do any of the counsel who will need to
17 participate further also need to be upstairs for the
18 docket call at 1:30, I think it is?

19 MR. WARD: I've got someone covering for my
20 group. So, no.

21 MR. SMITH: I will either get someone to cover
22 for me or someone else here will cover for me down here,
23 your Honor.

24 THE COURT: Okay. Then what I'd propose to
25 do, I -- unless counsel think that we can in just a few

1 minutes get through the rest of it, I propose to break
2 until after lunch.

3 I see no objection to that. Then we will
4 reconvene here at 1:30. I've got a conference call at
5 1:00, but I'll be clear in plenty of time to resume at
6 1:30. So, we will be in recess until that time. Thank
7 you.

8 (Recess, 12:09 p.m. to 1:33 p.m.)

9 THE COURT: I think we are ready now to turn
10 to the defendants' motions in limine.

11 Who wants to speak to those for the
12 defendants?

13 MR. ALAVI: Your Honor, I'm sorry to -- if I
14 may. On Motion in Limine No. 1 for the defendants,
15 there's a protective order issue because we are going to
16 be discussing a license with BlackBerry. BlackBerry has
17 designated that document as AEO, outside counsel only,
18 and has requested that we seek to have the courtroom
19 sealed during the discussion of that license and the
20 transcript designated as sealed. Or in the alternative,
21 if the court doesn't do so, that the parties refrain from
22 mentioning the amount of the settlement in the open
23 courtroom.

24 THE COURT: Well, I will just direct the
25 parties then not to mention the amount of the license

1 payment. I don't think there's any need to mention the
2 specific amount.

3 MR. JENNER: I think, your Honor, the numbers
4 are all contained in one provision of the agreement which
01:34PM 5 is quoted in full in the brief so that we can refer your
6 Honor to that and perhaps just refer to something like
7 numbers A, B, and C or something like that.

8 THE COURT: I think it's in your motion, in
9 fact, so --

01:34PM 10 MR. JENNER: Page 5, yeah.

11 THE COURT: Yes. So, I've got it; and it's no
12 problem.

13 I understand the request that's made in order
14 to comply with the agreement, but I'll deny the request
01:35PM 15 to close the courtroom and instead just ask that we not
16 mention the dollar amounts.

17 MR. ALAVI: Thank you, your Honor.

18 MR. JENNER: Having said all that, your Honor,
19 MIL No. 1 is pretty closely tied to the *Daubert* motion;
01:35PM 20 and as your Honor carried one of the MILs this morning,
21 would your Honor prefer to carry this MIL to
22 consideration with the *Daubert* or to go ahead and take
23 the whole thing on now?

24 THE COURT: If both sides are comfortable that
01:35PM 25 they have briefed the issue fully in connection with the

1 *Daubert* motion, I don't have a problem with taking it up
2 in that connection.

01:35PM

3 MR. ALAVI: The plaintiffs believe it's fully
4 briefed and are happy to have the MIL taken up with the
5 *Daubert* motion, your Honor.

6 THE COURT: All right. In that case, I will
7 carry defendants' Motion in Limine No. 1 to take it up
8 with the *Daubert* motion.

01:36PM

9 And being as I'm from Louisiana, I guess that
10 I should say I don't pronounce it *Daubert* or *Daubert*
11 (pronouncing) or any other French term because I was with
12 the lawyer from Ohio who represented the family at a
13 conference and he assured me that they call themselves
14 *Dauberts* (pronouncing). So, I simply refer to them as
15 *Daubert* motions. But I like the French pronunciation on
16 it otherwise, being from New Orleans; but anyway, we'll
17 take up the *Daubert* motion then.

01:36PM

18 Ms. Higgins.

01:36PM

19 MS. HIGGINS: Your Honor, Samsung's Motion
20 in Limine No. 2 specifically goes to Samsung's request
21 that references to two particular -- two agreements in
22 particular, a Wi-LAN agreement between Wi-LAN and Samsung
23 as well as a MOSAID agreement between MOSAID and Samsung,
24 request that references and testimony regarding these
25 licenses be excluded.

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1 And I think first and foremost, if you look to
2 Rembrandt's expert, Mr. Weinstein's expert report, what
3 you will find there is that Mr. Weinstein has admitted
4 that both of these agreements are not technologically
5 comparable to the patents-in-suit. So, we're dealing
6 with a situation here where we submit that these
7 agreements in the context of this lawsuit that relates to
8 Bluetooth and EDR -- that's "enhanced data rate
9 technology" -- these agreements specifically relate to
10 WiFi patents. And as your Honor may know, Wi-LAN and
11 MOSAID are notorious patent enforcement entities; and
12 they have been involved in a lot of litigation. So, we
13 submit that these agreements have no probative value.

14 Specifically, the Federal Circuit in *Lucent*
15 has said that a party must show that agreement be
16 sufficiently comparable to the hypothetical license at
17 issue in suit. That's 580 F.3d at 1325. And we would
18 submit that here these licenses are not that. They're
19 not relevant in this particular case.

20 I think if you look to Rembrandt's opposition,
21 what they say these agreements are relevant to is
22 Samsung's -- and this is a quote -- willingness -- this
23 is at page 5 of their opposition -- "Samsung's
24 willingness to pay to license patented technology."

25 That's any patented technology, your Honor. They're not

1 referring to the patented technology or even comparable
2 technology here. As their expert has admitted, these are
3 licenses that are not technologically comparable to the
4 patents-in-suit.

01:39PM

5 Rembrandt also argues that these agreements
6 must come in because they're the best evidence, and
7 that's just not the case here. Better evidence, by far,
8 for example, would be Samsung's agreement with BandSpeed
9 that pertains to two patents and specifically Bluetooth
10 technology.

01:39PM

11 In addition to not being probative, we also
12 submit that these two licenses, Wi-LAN and MOSAID, are
13 also highly prejudicial. Clearly what Rembrandt seeks to
14 do here is take two agreements that have nothing to do
15 with the technology at issue here and they want to waive
16 those agreements in front of the jury, agreements that
17 have big numbers in them, and this, quite frankly, is
18 highly prejudicial, not probative, and should be
19 excluded.

01:40PM

01:40PM

20 And indeed, you know, based on your Honor's
21 ruling earlier today where your Honor considered 403 in
22 connection with an agreement in connection with the
23 patents-in-suit, here we're dealing with agreements that
24 are even way far afield from that and should also be
25 excluded not only under 402 but 403.

01:40PM

1 THE COURT: Ms. Higgins, tell me: How did
2 these licenses come to be at issue in this case?

3 MS. HIGGINS: There were document requests,
4 your Honor, that were served that were broad; and, so,
01:40PM 5 they were produced in the course of discovery. They were
6 then included in Mr. Weinstein's expert report under
7 *Georgia-Pacific* Factor 2 and then indeed in response to
8 that included in Samsung's expert report and specifically
9 distinguishes having to do with WiFi technology, not
01:41PM 10 Bluetooth technology.

11 THE COURT: But you mentioned that your
12 position is that they have no relationship to the
13 technology at issue and, yet, they were responsive to a
14 request. How is that?

01:41PM 15 MS. HIGGINS: Because they were, as I
16 understand it, your Honor, a broad document request that
17 sought production of Samsung's license agreements.

18 THE COURT: Well, it's my understanding from
19 the briefing that there were three licenses produced and
01:41PM 20 that these are two of the three.

21 MS. HIGGINS: Yes, your Honor. So, Wi-LAN and
22 MOSAID are two of them. The third agreement that was
23 produced is the Samsung/BandSpeed agreement. And as I
24 explained, that agreement dealt specifically with two
01:42PM 25 patents and Bluetooth technology, not WiFi technology.

1 THE COURT: Okay. All right. Let me hear
2 from counsel for the plaintiff, and I'll give you a
3 chance to respond.

01:42PM

4 MR. ALAVI: Your Honor, Mr. Talanov from our
5 firm will argue it. And if the court will indulge me,
6 the numbers in the agreements are AEO; so, we will not
7 be, in the argument, disclosing the numbers in the
8 agreement because of the designations on those documents.

01:42PM

9 THE COURT: All right. That's fine. I don't
10 have a need for the numbers.

11 And you're Mr. Talanov?

12 MR. TALANOV: Yes, Mr. Talanov for Plaintiff
13 Rembrandt, your Honor.

14 THE COURT: All right.

01:42PM

15 MR. TALANOV: Your Honor, if I may, Rembrandt
16 is not disputing the fact that the MOSAID and Wi-LAN
17 licenses are not comparable; but nevertheless, they are
18 highly relevant under several *Georgia-Pacific* factors
19 because they provide the context of the hypothetical
20 negotiation, including the willingness and the
21 reasonableness of the parties entering into the
22 hypothetical negotiation as well as the general licensing
23 practices and the commercial context surrounding the
24 hypothetical negotiation.

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01:43PM

25 THE COURT: Well, do you want these in even if

1 they come in without the numbers?

2 MR. TALANOV: No, your Honor. We believe that
3 the numbers are highly relevant as well. And just to be
4 clear, we believe that this is highly similar to your
01:43PM 5 Honor's -- right along the lines of your Honor's ruling
6 on Plaintiff's Motion in Limine No. 16 that had to do
7 with the Bluetooth RANDZ license where defendants argued
8 that this license is -- essentially the same argument,
9 that it's highly probative of the context of hypothetical
01:44PM 10 negotiation and specifically comparing it to the size of
11 the Rembrandt claim. And we believe that the numbers of
12 the MOSAID and Wi-LAN licenses are highly relevant in
13 this case because otherwise the jury would be unfairly
14 misled and Rembrandt would be prejudiced by only
01:44PM 15 considering the royalty-free Bluetooth RANDZ license --
16 which, by the way, has not been established as
17 sufficiently comparable and does not relate specifically
18 to the patents-in-suit -- and also the lower value
19 BandSpeed license. So, we believe that the jury is
01:44PM 20 entitled to hear the evidence and to see all the licenses
21 and all the amounts to sufficiently establish the context
22 of the hypothetical negotiation.

23 THE COURT: And --

24 MR. ALAVI: If I may, your Honor, the way
01:45PM 25 Mr. Weinstein uses these licenses is in Factor No. 15 to

1 establish the willingness of Samsung to license patented
2 technology and the willingness of Samsung to pay material
3 amounts of money to license such technology. We didn't
4 cherry-pick these licenses. These were the three
5 licenses that Samsung produced in response to the request
6 for production.

01:45PM

7 THE COURT: And what was the request for
8 production?

9 MR. ALAVI: The request for production covered
10 licenses for Bluetooth or -- I don't think it used the
11 word "comparable" -- Bluetooth or other wireless patents.

01:45PM

12 If you're left with just the BandSpeed license
13 and the Bluetooth license, Mr. Weinstein is not -- so,
14 there's two issues. One, can we get these licenses in
15 without the numbers. The answer is we want them even
16 without the numbers just to show that in the commercial
17 context, under Factor No. 15, that Samsung is willing to
18 enter into negotiations and enter into licenses for
19 bandwidth technology. That's *Georgia-Pacific* Factor 15.

01:45PM

20 The numbers are relevant because it shows that
21 Samsung pays more than nominal amounts to license
22 important technology. You exclude the numbers and what
23 you are left with is two licenses that Samsung
24 handpicked, the Bluetooth license with SIG -- that's the
25 Zero -- and the BandSpeed license for a lower number.

01:46PM

01:46PM

1 And it creates a false impression with the jury as to
2 what Samsung is willing to pay for licenses for
3 technology that they believe is important.

01:46PM

4 If they had produced hundreds of licenses, I
5 think they could have made an argument that we
6 cherry-picked the best licenses. This was all that was
7 produced. So, we have to be able to allow the expert to
8 testify about the commercial context; and that's what
9 Mr. Weinstein does. And he's very clear in his report

01:46PM

10 that he does not use this as a comparable license and he
11 does not suggest that they are a basis for calculating
12 royalty. They establish the commercial context, which is
13 Samsung enters into licenses for patented technology in
14 the wireless area and is willing to pay substantial
15 amounts of money to do so. So, that's the context that
16 it's used in *Georgia-Pacific* Factor 15.

01:47PM

17 MR. TALANOV: Your Honor, if I could make just
18 one additional point. Counsel for Samsung cites to the
19 *Lucent v. Gateway* opinion from Federal Circuit. However,
20 the cite that Samsung provides specifically relates to
21 Factor No. 2 within the *Georgia-Pacific* factor where it
22 goes to calculating the actual amount of the royalty.

01:47PM

23 Here, your Honor, what we're doing is we're
24 not trying to say that the MOSAID and the Wi-LAN licenses
25 should go into the actual calculation or to suggest to

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1 the jury what the actual range for the damages amount
2 should be. What we're doing is we're trying to say is
3 under other factors, such as 8 and 15, these licenses are
4 highly instructive of the context of the negotiation, the
5 willingness and the reasonableness of the negotiation.
6 In other words, if Samsung was only willing to pay
7 nominal amounts as opposed to higher amounts, the jury
8 may not consider that reasonable for Samsung to not
9 pay --

01:48PM

10 THE COURT: Mr. Talanov, do you have any
11 reason to believe that there were more licenses that
12 would have been responsive to that request than the three
13 that were produced by Samsung?

01:48PM

14 MR. TALANOV: Your Honor, I have no such
15 reason to believe that there were more. These are the
16 licenses that Samsung did produce. They could have
17 objected, but these are the licenses that Samsung did
18 produce in response to our request for any licenses
19 related to this lawsuit.

01:48PM

20 THE COURT: All right. The only -- I don't
21 want to say "the only." The main factor that you have
22 argued that relates to the amount of these licenses is
23 willingness to pay more than minor amounts for technology
24 licenses. Do you have any case law that you think

01:49PM

25 supports the idea that the court should allow licenses

1 that aren't of comparable technology in order to support
2 that factor?

3 MR. TALANOV: Well, your Honor, we don't have
4 any specific cases on point; but I would just refer your
01:49PM 5 Honor back to the decision with regard to Plaintiff's
6 Motion in Limine No. 15. It hasn't been established that
7 the Bluetooth RANDZ licenses relate to these patents or
8 that they are sufficiently comparable. They haven't been
9 addressed as such in either parties' expert reports; and,
01:49PM 10 yet, our belief is that it's best for this type of
11 testimony -- for the licenses to be considered and for
12 counsel to develop testimony of experts regarding these
13 licenses both on direct and cross.

14 THE COURT: All right. Ms. Higgins, I'll give
01:50PM 15 you the last word on this.

16 MS. HIGGINS: Yes, your Honor. Under
17 Rule 403, these licenses are clearly highly prejudicial
18 and indeed it's straight out admitted conditioning of the
19 jury to high royalty numbers that have nothing to do with
01:50PM 20 the patents-in-suit here.

21 In particular, Rembrandt doesn't need the
22 numbers in these irrelevant, noncomparable agreements to
23 argue that Samsung is willing to pay money for patented
24 technology. The relevant test here should be whether or
01:50PM 25 not these agreements are comparable, and their own expert

1 admits in his report that they are not.

2 In terms of case law, we did cite the *Lucent*
3 case; and I still think that that case applies here.

01:51PM

4 Your Honor, I may suggest another Federal Circuit case,
5 which I'm sure your Honor is familiar with, *RescueNet*.

6 On *RescueNet*, certain agreements were kept out; and
7 certain agreements were allowed in. With respect to
8 agreements that were precluded, what the court said in
9 *RescueNet* was (reading) notably, none of these licenses

01:51PM

10 even mention the patent-in-suit or show any other

11 discernable link to the claimed technology. And that's

12 exactly what we have here. We have two agreements that

13 have nothing to do with the patent-in-suit. If Samsung

14 had patents to -- Samsung sells refrigerators; and if

01:51PM

15 they had licenses with high numbers in them that related

16 to refrigerators, would they be able to allow Rembrandt

17 to wave those licenses in front of the jury? This is the

18 same situation.

19 In terms of discovery, the document requests

01:52PM

20 that were served on Samsung were broad. They were

21 related to "Give us your license agreements relating to

22 wireless technology." That includes WiFi. These

23 agreements were produced, but that does not mean that

24 they should be put in front of the jury here. They are

01:52PM

25 highly prejudicial and should be kept out.

1 THE COURT: I understand your arguments. I'm
2 going to carry this motion. I want an opportunity to
3 look at the case law a little more closely.

4 Let's move on to No. 3.

01:52PM

5 MS. HERMES: Your Honor, as to Plaintiff's
6 Motion in Limine No. 3, we seek to preclude Rembrandt
7 from referencing Samsung's gross profit, gross revenue
8 figures as well as indications of Samsung's wealth. That
9 was also a topic mentioned in our *Daubert* motion, and

01:53PM

10 here it is more broad. We would want to preclude not
11 just Mr. Weinstein but any witness from disclosing those
12 sorts of large billion-dollar figures that would be
13 prejudicial to Samsung.

01:53PM

14 THE COURT: And I understand there's an
15 agreement on this one; is that right?

16 MR. ALAVI: Yeah. Your Honor, my
17 understanding is we've entered into a stipulation and
18 filed it with the court that resolves this motion
19 in limine.

01:53PM

20 THE COURT: I knew that there was a
21 stipulation, and I didn't know -- or didn't remember
22 which motion it was regarding.

01:53PM

23 MR. ALAVI: So, we negotiated specific
24 language on this in the stipulation; so, I think it's
25 moot.

1 MS. HERMES: I'll just note that the
2 stipulation only refers to Mr. Weinstein's testimony and
3 only discusses the *Daubert*; but if counsel is happy for
4 this stipulation to apply to the motion in limine,
5 then --

01:54PM

6 MR. ALAVI: I'm confused, your Honor. We had
7 a negotiation to resolve both this MIL and the *Daubert*
8 motion on this point and entered into a stipulation. So,
9 if it's the defendants' position that they now want to
10 argue the motion in limine and get a broader protection,
11 I think we can withdraw the stipulation and argue it. I
12 don't see the need to do so when we've negotiated a
13 stipulation to deal with this motion in limine and the
14 *Daubert* motion.

01:54PM

15 THE COURT: Is there a disagreement about --

01:54PM

16 MS. HERMES: Well, as I read -- yes. I
17 believe I -- yes, that's correct. The stipulation states
18 that Rembrandt agreed to Samsung's Motion in Limine
19 No. 3, including as set forth in the stipulation; and
20 that was in the corrected notice of agreements reached
21 during the meet and confer. So, if that is the agreement
22 of the parties, then we are in agreement.

01:54PM

23 MR. ALAVI: But the scope of the agreement set
24 forth in the stipulation.

01:55PM

25 MS. HERMES: Well, the stipulation only refers

1 to --

2 THE COURT: There's a separate document
3 entitled "Stipulation"? Is that what you're indicating?

4 MR. ALAVI: Yes, your Honor. The way we
01:55PM 5 resolved this MIL as well as another MIL and a portion of
6 the *Daubert* motion was through a stipulation that the
7 parties negotiated, drafted, entered into, and filed with
8 the court.

9 THE COURT: All right. And, Ms. Hermes, are
01:55PM 10 you aware of that stipulation?

11 MS. HERMES: I'm holding it in my hand.

12 THE COURT: All right. Does that resolve it?

13 MS. HERMES: To the extent that plaintiffs do
14 not intend to introduce testimony of Samsung's gross
01:55PM 15 revenues, gross profits, and wealth, if that's the
16 understanding of both sides, then yes, it is resolved.

17 THE COURT: Well, I'm --

18 MR. ALAVI: We're going to abide by the
19 stipulation, your Honor.

01:56PM 20 THE COURT: All right.

21 MS. HERMES: The stipulation doesn't actually
22 refer to the motion in limine. The stipulation withdraws
23 a portion of the *Daubert* motion in exchange for
24 withdrawing portions of Mr. Weinstein's report and
01:56PM 25 refraining Mr. Weinstein from testifying about them. So,

1 we believe it would be counter to the agreement the
2 parties reached if Rembrandt then put the testimony in
3 through another witness.

01:56PM

4 MR. JENNER: I'm sorry. Your Honor, do you
5 have a copy of that stipulation? Is that what you're
6 looking at?

7 THE COURT: I'm looking at the corrected
8 notice, which is Document 220; and I'm trying to put my
9 hands on the stipulation.

01:56PM

10 MR. JENNER: It's on page -- well, they're not
11 numbered -- yeah, page 2 of 7, it says at the top; and
12 it's within Roman No. III on that page 2. And the
13 language that I think counsel are referring to is the
14 second paragraph that begins "Samsung withdrew
15 Defendants' Motions in Limine 5 and 6" and so forth.

01:57PM

16 Do you have that?

17 THE COURT: I do. But what I'm understanding
18 from Mr. Alavi is that there is another document entitled
19 "Stipulation"; is that right?

01:57PM

20 MS. HERMES: Yes. I have an extra copy if
21 you'd like for me to pass it up, your Honor. It's Docket
22 No. 222.

23 THE COURT: Okay.

01:57PM

24 MR. JENNER: Your Honor, rather than force you
25 to hunt around for this, I'd be happy to hand up what I'm

1 told is the further stipulation.

2 THE COURT: I guess -- all right. I'm just
3 trying to figure out if the parties believe they have
4 resolved Motion in Limine No. 3.

01:57PM

5 MR. ALAVI: Your Honor, I think I can solve
6 this. The stipulation and the reason why the stipulation
7 is important to the plaintiff is that when we addressed
8 this issue, there is a carve-out in the stipulation that
9 allows our expert to talk about what the gross profit

01:58PM

10 margin is and allows him to discuss that he looked at,
11 for example, Samsung's financial information and how he
12 calculated the gross margin, without revealing that
13 information. So, I thought that we had resolved this MIL
14 and the *Daubert* motion with this stipulation.

01:58PM

15 If the defendants now believe that the
16 stipulation is too narrow because it only speaks to
17 Mr. Weinstein, I'm happy to solve that problem for them
18 as long as the stipulation -- as long as the Motion
19 in Limine No. 3 as granted has the same carve-out that's
20 in the stipulation that will allow Mr. Weinstein, the
21 expert, to talk about gross margin calculations, how he
22 came about it, and there's some additional language about
23 what he's trying to say.

01:58PM

24 What I don't want to have happen is you grant
25 MIL No. 3 and suddenly that is a broader grant of relief

01:58PM

1 on Mr. Weinstein than what's in the stipulation. That's
2 why I keep pointing to the stipulation, because the MIL
3 is much broader than what we agreed to in the
4 stipulation.

01:59PM

5 THE COURT: Well, I'm looking at the
6 stipulation now on page 2 of Document 222, paragraph 3a,
7 where it says, "However, in the event that the court
8 denies Sections 5 and 6 of Samsung's *Daubert* motion" and
9 following then.

01:59PM

10 So, is that contingent on the outcome of
11 another motion?

01:59PM

12 MS. HERMES: If I could respond. Your Honor,
13 if the court denies those sections of Samsung's *Daubert*
14 motion, Samsung certainly intends to abide by the
15 provisions of Section 3a of the stipulation. Our concern
16 is that there's no doubt that by covering the stipulation
17 through the stipulation here and not ignoring the broader
18 language in the report to the court, that Rembrandt won't
19 be able to introduce, you know, multibillion-dollar

02:00PM

20 revenue and profit figures through a witness other than
21 Mr. Weinstein, which we believe would be prejudicial. We
22 just want to make sure there's no misunderstanding there.

02:00PM

23 MR. ALAVI: To answer your question, your
24 Honor, there's a *Daubert* motion to strike Mr. Weinstein's
25 actual opinions; and if the court denies that *Daubert*

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1 motion, then we'll have a damage expert. That's what
2 that Section 5 and 6 talks about. And he'll be allowed
3 to talk about it -- even though he won't be able to talk
4 about, under our stipulation, the actual revenue number
5 and the actual profit number, he's allowed to talk about
6 certain things like the gross profit margin and how he
7 calculated it and that he wasn't making it up out of thin
8 air, he actually looked at numbers. So, I thought that
9 resolved both the MIL and the motion to strike as part of
10 the *Daubert* motion.

11 We're happy to enter into and agree to MIL 3
12 since defendants don't have that understanding; but we
13 want that carve-out that's in the stipulation to be part
14 of MIL 3 so that the granting of the MIL does not take
15 away what we've agreed to in the stipulation as it
16 relates to Mr. Weinstein.

17 MS. HERMES: We're amenable to that, your
18 Honor.

19 THE COURT: All right. Then Motion in Limine
20 No. 3 will be granted subject to the provisions of
21 paragraph 3 of the stipulation in Docket 222.

22 MR. ALAVI: I don't have the stipulation in
23 front of me. If I may speak to Ms. Hermes and
24 double-check. As you can tell, I was not anticipating we
25 would be arguing this motion in limine so...

1 That's correct. Paragraph 3a.

2 THE COURT: Okay. All right.

3 MR. ALAVI: We apologize for the confusion on
4 that motion in limine, your Honor.

02:02PM

5 THE COURT: Okay. I think we've addressed
6 No. 4 to some extent. That's Samsung's status as a
7 foreign company. And with the understanding that we're
8 granting that except as it may be relevant to any issues
9 in this case. In other words, it is not that it -- there
10 can be no mention of their foreign status but just that
11 there will only be mention or argument in connection with
12 an issue to which their nationality is relevant.

02:03PM

13 Ms. Hermes, do you have a better idea of how
14 to approach that?

02:03PM

15 MS. HERMES: No, your Honor.

16 THE COURT: Okay.

17 MS. HERMES: Your Honor, I was just standing

18 up because I believe that there was a footnote that
19 defendants had addressed in their opposition and just

02:03PM

20 wanted to make sure that we didn't pass Motion in Limine
21 No. 4 about the Footnote 4 on page 7 of plaintiff's
22 motion in limine that says (reading) Samsung also moves
23 to preclude any testimony or argument regarding the
24 absence of any Samsung witness at trial or any suggestion
25 or questions of a witness or argument that a witness or

02:04PM

1 party is not trustworthy or is dishonest based on the
2 language they speak, their nationality or ethnicity. I
3 think that the opposition was geared at the first
4 sentence of that, but I'll defer to counsel for
5 Rembrandt.

02:04PM

6 MR. ENGER: Your Honor, I'm not sure about the
7 propriety of including a separate MIL in a footnote; but
8 to the extent that that's proper, as we set forth in our
9 response, we believe that there is this missing person
10 presumption that the testimony would be unfavorable. And
11 we've cited a number of cases where that was the case.
12 We haven't heard any reason why those cases don't apply
13 here. So, there's -- we should be afforded the
14 long-standing missing witness presumption for witnesses
15 not called who are under Samsung's control.

02:04PM

02:05PM

16 MS. HERMES: We have a response to that, your
17 Honor.

18 THE COURT: All right. Samsung is seeking
19 here to preclude any reference to an uncalled witness; is
20 that right?

02:05PM

21 MS. HERMES: In particular what we had in mind
22 was the idea that Rembrandt would suggest that there was
23 something improper about Samsung not bringing a
24 high-level or C level executive from Korea. That's why
25 we have included it in this motion in limine, because it

02:05PM

1 related to the fact that Samsung is a foreign
2 corporation.

02:05PM

3 So, obviously to the extent witnesses were
4 disclosed as having information relevant to the case,
5 they have been deposed and the parties are working
6 towards the admissibility of that testimony. Or
7 obviously if a witness comes live, Rembrandt would be
8 entitled to cross-examine them. This would be the idea
9 that Samsung should have brought some sort of C level
10 executive and that if they don't, then Rembrandt can
11 argue to the jury that that says something about the
12 value of the case to Samsung.

02:06PM

02:06PM

13 THE COURT: You know, the uncalled witness
14 rule is that a witness who is equally available to both
15 sides cannot be attributed to either side for failing to
16 call them. But to the extent that witnesses are not
17 equally available, such as Samsung witnesses who are
18 beyond the subpoena power of the court, why should the
19 court preclude the defendant from -- or the plaintiff
20 from commenting on the failure to call?

02:06PM

02:07PM

21 MS. HERMES: We're not aware that Rembrandt
22 has requested that any particular C level employee be at
23 the trial; and, so, it would be that they wouldn't call
24 anybody and then they would still argue that somehow it
25 was improper for us to have not brought someone anyway.

1 THE COURT: I mean, I occasionally see this
2 motion granted as a mutual motion where both sides agree
3 not to comment on the other side's failure to call a
4 witness; but absent any agreement, the only thing the
5 court would enforce would be the standard rule that if
6 the witness is equally available to both sides, then --
7 then you can't comment on that and attribute it to the
8 other side.

9 MS. HERMES: We would certainly be open to a
10 mutual agreement if the other side -- but we're not aware
11 that they have requested the availability of any
12 witnesses that we're not providing.

13 THE COURT: Mr. Enger?

14 MR. ENGER: Your Honor, what this -- what we
15 want to make sure that we preserve the right to do, if
16 they bring a corporate representative who is not
17 particularly knowledgeable about the facts or issues of
18 this case, we want to be able to point out to the jury
19 that they brought a corporate representative who is not
20 knowledgeable about this issue. As long as we're allowed
21 to cross-examine the witness on that particular issue and
22 point out that they could have brought someone that was
23 more knowledgeable but chose not to, then we don't have a
24 problem here.

25 THE COURT: Well, the question is: Do you

1 join in a request to have a rule that's broader than the
2 default rule which is just that it only applies to
3 witnesses that are equally available to both sides?

4 MR. ENGER: No, your Honor.

02:08PM

5 THE COURT: In that case, I'll deny the
6 request and either side can comment on the failure of the
7 other side to call any witness that is not equally
8 available to their side.

02:09PM

9 MR. JENNER: Your Honor, I'm not sure I
10 understand what their predicate is for this. I mean, I
11 could understand it if they had asked us to bring a
12 particular witness with germane knowledge about
13 something. Samsung has thousands and thousands of
14 witnesses in Korea, and what the -- I think what I hear
15 them asking the court is to be able to choose anybody who
16 doesn't show up that we didn't know they wanted and make
17 an uncalled witness argument on that. That just doesn't
18 seem fair.

02:09PM

19 THE COURT: I don't think I heard that from
20 Mr. Enger. What he indicated was that if your witness is
21 not able to answer certain relevant questions, that they
22 wanted to be able to criticize you for bringing a witness
23 who didn't have that knowledge.

02:09PM

24 MR. JENNER: That narrows it down somewhat
25 but --

02:09PM

1 THE COURT: Well, do you have any authority
2 for the proposition that the court can preclude them from
3 commenting on the failure of one side to call witnesses
4 that are only available to it? If you do, tell me about
5 it.

02:10PM

6 MR. JENNER: Well, your Honor, I don't. I
7 don't know that we understood this is where this was
8 going to wind up. But as I understand it, they had asked
9 for one witness; and we don't know about other witnesses.
10 We don't know what they would want to cross-examine them
11 about. So, unless what they were to cross about and
12 complain about a lack of knowledge in response to is
13 strictly limited to the scope of the direct, I guess I
14 could understand where they would be coming from. But if
15 there were to be any opportunity to start cross-examining
16 witnesses about subject matters that we had no reason to
17 anticipate and then take the position that we should have
18 brought somebody else who could answer the questions that
19 we didn't anticipate, it just doesn't seem fair.

02:10PM

20 So, I guess what I'm saying is no, I haven't
21 looked for authority on what we're talking about now.
22 I'd like to have the opportunity to do that if it's
23 important to your Honor. But it just seems to me that
24 right now this is a fairness issue.

02:11PM

25 THE COURT: And what you're seeking in

02:11PM

1 fairness is a rule to prohibit them from what?

2 MR. JENNER: Making the uncalled witness
3 argument as to witnesses they gave us no opportunity or
4 notice to bring to the trial, because that would seem to
5 be argument by ambush.

6 THE COURT: Okay. When do you want that
7 notice?

8 MR. JENNER: Well, given the fact that we have
9 to try to get people freed up in Korea, I'd like to have
10 that notice as expeditiously as possible, if there's
11 somebody they think that should come. I know they can't
12 do that today. But if they're making this argument, I
13 presume they've got something in mind. We'd like to hear
14 about it by perhaps the end of the day tomorrow.

15 THE COURT: I don't know. Our rules typically
16 don't provide for one side to ask the other to bring
17 particular witnesses, but if that's what you're
18 proposing.

19 MR. ENGER: Your Honor, this is --

20 MR. JENNER: Had I known, your Honor, if there
21 was some witness of that character, I would have thought
22 the witness that they want us to bring would be on their
23 witness list, so that they really ought to know who that
24 witness is. If it's somebody that's not on their witness
25 list, then I don't know where this is coming from.

1 THE COURT: Basically I don't think that this
2 is in a posture at this point for me to decide; but I'll
3 say that to the extent that Samsung was asking for relief
4 in Footnote 4 on page 7 of your motion in limine, that
5 relief is denied. And if you come up with a basis to
6 seek additional relief, let me know.

02:13PM

7 MR. JENNER: Okay. Thank you, your Honor.

8 THE COURT: 5 and 6 I think were by agreement.
9 They're withdrawn by defendant?

02:13PM

10 MS. HERMES: Yes. Yes, your Honor. We
11 withdrew those as duplicative of the exact evidence we
12 were asking you to exclude in the *Daubert* motion. So,
13 it's subject to the stipulation.

14 THE COURT: 7 is -- as I understand it,
15 although 7 is worded broadly at the introduction, it is
16 intended to relate specifically to just two witnesses,
17 Philip Koopman and Stuart Kerry; is that right?

02:14PM

18 MR. HADDAD: Yes, your Honor.

19 THE COURT: And your request is based on the
20 failure to timely disclose those witnesses?

02:14PM

21 MR. HADDAD: Yes, your Honor. I mean, as we
22 had mentioned in our motion, there were 13 witnesses that
23 they put on their trial witness list that were not
24 disclosed in their 26(a) disclosures; but we're not
25 complaining about the bulk of them. It's just the two

02:14PM

1 that were never deposed.

2 The first time we ever heard of these
3 witnesses was in their invalidity -- their invalidity
4 expert's report in November of 2014.

02:14PM

5 THE COURT: I tell you what, Mr. Haddad, let
6 me let them first try to tell me what their theory is on
7 disclosure; and then I'll give you a chance to respond to
8 that.

9 MR. HADDAD: Thank you, your Honor.

02:15PM

10 THE COURT: Thank you.

11 MR. ENGER: Thank you, your Honor. This is
12 not -- Dr. Akl's report was not the first time that
13 defendants had ever heard of Messrs. Kerry and Koopman.
14 These are authors of defendants' own prior art documents.

02:15PM

15 Mr. Koopman wrote an article that they were relying upon
16 as --

02:15PM

17 THE COURT: Mr. Enger, then knowing about a
18 person's existence and then knowing that you intend to
19 call the person as a witness are two very different
20 things. When did you disclose to the other side that you
21 intended to call these individuals as witnesses at the
22 trial?

02:15PM

23 MR. ENGER: They showed up by name in our --
24 Dr. Akl's invalidity report, and the first time that they
25 showed up as a witness for trial was on the trial list.

1 THE COURT: Why?

2 MR. ENGER: Well, frankly, you know, we didn't
3 discover their relevance and their importance until later
4 in the case.

02:16PM

5 THE COURT: So, what is the actual date on
6 which the defendant was first given notice of any intent
7 to call either of these as witnesses?

8 MR. ENGER: In the expert report of Dr. Ak1.

02:16PM

9 THE COURT: Did that expert report state that
10 you intended to call them as witnesses?

11 MR. ENGER: It did not. It said that they had
12 conversations with the invalidity expert Dr. Ak1, and it
13 set forth two and three pages long of exactly what the
14 conversation was.

02:16PM

15 THE COURT: And when is the first date that
16 you advised the defendant of an intent to call them as
17 witnesses?

18 MR. ENGER: I believe that would be on the
19 trial list, your Honor.

02:16PM

20 THE COURT: And I'm just trying to get a date.
21 I don't know when you exchanged those.

22 MR. ENGER: I believe it was in early
23 December, your Honor. I can look at the pleadings.

24 December 5th.

02:17PM

25 THE COURT: And, Mr. Enger, do you contend

1 that that is a timely disclosure of a witness under the
2 rules?

3 MR. ENGER: Well, your Honor, I think it was a
4 harmless -- no harm, no foul kind of situation because
02:17PM 5 there was still an opportunity to depose both gentlemen.
6 Defendants never asked for it.

7 THE COURT: And you're saying they could have
8 asked to take their depositions late, or are you
9 contending that's within the time allowed for
02:17PM 10 depositions?

11 MR. ENGER: I'm saying they could have asked
12 to take the depositions later, your Honor.

13 THE COURT: All right. And what is the
14 prejudice to your side if they're not allowed to testify?

02:18PM 15 MR. ENGER: With respect to Kerry, on one side
16 you'll have O'Hara who is one of the authors of this
17 draft WiFi standard. He'll show up live at trial, and
18 he'll be able to say that it was publicly available.

19 Mr. Kerry, who was actually more senior on that
02:18PM 20 committee, has the exact opposite conclusion. We should
21 be able to present rebuttal testimony to Mr. O'Hara --
22 namely, that testimony of Mr. Kerry -- to show that the
23 draft WiFi standard was not publicly available.

24 THE COURT: And when did you learn of the
02:18PM 25 position of Mr. O'Hara on it?

1 MR. ENGER: I believe sometime over the
2 summer.

3 THE COURT: And when did you learn that
4 Mr. Kerry had a different position on that?

02:18PM

5 MR. ENGER: I believe we didn't identify
6 Mr. Kerry until shortly before Dr. Akl's rebuttal report
7 was due.

8 THE COURT: Which was when?

9 MR. ENGER: Early November.

02:19PM

10 THE COURT: And what about Mr. Koopman?

11 MR. ENGER: What specifically about

12 Mr. Koopman?

13 THE COURT: I mean -- all right. What is the
14 prejudice to your side if Mr. Koopman is not allowed to
15 testify?

02:19PM

16 MR. ENGER: Defendants are misinterpreting a
17 paper that Dr. Koopman wrote in such that they are
18 believing that it provides a motivation to combine the
19 prior art with a master/slave protocol. Dr. Koopman
20 would show up at trial and would explain that they've
21 completely misinterpreted his paper. It does -- in fact,
22 it teaches away from applying a master/slave protocol.
23 So, it would present an unfair picture of the evidence to
24 the jury, your Honor.

02:19PM

25 THE COURT: And when did you learn that the

1 defendant would be presenting that picture which you
2 believe is unfair?

3 MR. ENGER: They identified Dr. Koopman's
4 paper early in the case and -- at the time of their
02:20PM 5 initial invalidity contentions; but it wasn't until much
6 later in the case whenever we received their invalidity
7 report, Dr. Goodman's report, that we realized it would
8 be such an important part of their invalidity case.

9 THE COURT: And when was that?

02:20PM 10 MR. ENGER: September.

11 That sound right, Gerry?

12 MR. HADDAD: Goodman's? October 6th.

13 MR. ENGER: October 6th.

14 THE COURT: So, you learned of that
02:20PM 15 October 6th; and you listed Koopman as a witness two
16 months later.

17 MR. ENGER: Yes, your Honor.

18 THE COURT: Is there any reason you didn't do
19 that sooner?

02:20PM 20 MR. ENGER: We believed that putting them on
21 notice of the conversation in Dr. Akl's report was
22 sufficient.

23 THE COURT: You don't really think that just
24 somebody knowing of the existence of a person is the same
02:21PM 25 as putting them on a witness list, do you?

1 MR. ENGER: No, your Honor.

2 THE COURT: Well, I -- so, did -- you really
3 thought that the fact that your expert mentioned the
4 person --

02:21PM

5 MR. ENGER: It was more than a mention. It
6 was several pages of a conversation that they had. It
7 put them on notice certainly that he was an important
8 person to their invalidity case.

02:21PM

9 THE COURT: Yes. And they're not claiming
10 that you failed to disclose the existence of the person,
11 just that it wasn't a timely designation as a witness.
12 Yes?

13 MR. ENGER: I believe that's their position,
14 your Honor.

02:22PM

15 THE COURT: All right. Thank you, Mr. Enger.

16 MR. HADDAD: Your Honor, one more thing about
17 Mr. Koopman. I'd just like to add that he's a paid
18 expert. The testimony they're using from Dr. Koopman
19 is -- he's going to be interpreting an article that he
20 wrote and making some arguments that another article he
21 wrote interprets that article -- the article on which we
22 are relying, a published article, should be interpreted
23 somehow differently. We've received no expert report on
24 that either, and that is expert testimony. It's doing an
25 interpretation analysis. It's not just that he is a fact

02:22PM

1 witness. There's an issue there as well, your Honor.

2 THE COURT: All right. With respect to
3 Mr. Kerry, what do you say to the prejudice argument that
4 Mr. Enger made about the jury being left with an unfair
5 impression of the evidence?

02:23PM

6 MR. HADDAD: Your Honor, Mr. Kerry, we just
7 learned about him -- this is sort of a trial by ambush
8 here. We disclosed Mr. O'Hara early on, long ago, well
9 within the fact discovery time period in our 26(a)
10 disclosures. Rembrandt had plenty of opportunity to take
11 his deposition, learn what he was going to say; and they
12 have known about Mr. Kerry since October of 2013. They
13 had 90 people to choose from that were disclosed on this
14 piece of prior art and which we disclosed back in October
15 of 2013. We relied on Mr. O'Hara. They knew what our
16 position was with Mr. O'Hara. They had plenty of time to
17 find someone, and we learned about it just a few weeks
18 ago.

02:23PM

02:23PM

19 THE COURT: Do you agree that Mr. Kerry and
20 Mr. O'Hara have opposing positions on whether or not this
21 information was publicly available?

02:24PM

22 MR. HADDAD: It's hard to say without us
23 knowing really what happened in a hearsay conversation.
24 There's a phone call between their expert and someone
25 else, and it's hard to say what our interpretation is of

02:24PM

1 their -- of their expert's phone call without us asking
2 some more questions. And we didn't have that
3 opportunity. Absolutely no opportunity. And we're just
4 weeks from trial here.

02:24PM

5 THE COURT: I understand. They've indicated
6 that they did not learn of this -- of the materiality of
7 Mr. Kerry's testimony until recently as well.

02:25PM

8 MR. HADDAD: They must have known the
9 materiality of Mr. Kerry's testimony. They took the
10 deposition of Mr. O'Hara during the summer, and
11 Mr. Kerry's testimony is to oppose Mr. O'Hara. So, they
12 must have known that -- maybe they didn't like what
13 Mr. O'Hara said. They could have found someone else.
14 And that was during the summer, and fact discovery didn't
15 close. We extended fact discovery for certain issues
16 several times for things that the various parties weren't
17 able to conclude. But, you know, we just found out about
18 this when the trial list was served on us a couple weeks
19 ago, month ago.

02:25PM

20 THE COURT: And do you have reason to believe
21 that the plaintiff knew about Mr. Kerry's position on
22 this issue well before they notified you?

02:25PM

23 MR. HADDAD: They certainly could have asked
24 him and let us know. They knew of Mr. O'Hara's position
25 as of the summer, long before fact discovery closed; and

1 they could have picked one of the 90 people that were on
2 this list that were -- also attended these meetings and
3 found someone within the time period of fact discovery,
4 not just let us know in the trial on the trial witness
5 list.

02:26PM

6 THE COURT: All right. Let me hear from
7 Mr. Enger again on Mr. Kerry.

8 When did you become aware of Mr. Kerry's
9 position on this issue about public knowledge?

02:26PM

10 MR. ENGER: Not until shortly before Dr. Ak1's
11 report when we disclosed it to defendants.

12 THE COURT: And that was what date again?

13 MR. ENGER: September.

14 Dr. Ak1's report, the initial -- the
15 invalidity rebuttal reports were in October.

02:26PM

16 MR. HADDAD: November.

17 MR. ENGER: November.

18 THE COURT: So, you learned of this sometime
19 in around November or just before; and you disclosed it
20 December the 5th?

02:27PM

21 MR. ENGER: We put the witness on the witness
22 list on December the 5th. That's right. We learned
23 about it during the one-month period whenever Dr. Ak1 was
24 preparing his invalidity rebuttal report. We disclosed
25 it shortly thereafter in the report, and then we put him

02:27PM

1 on the list December 5th.

2 THE COURT: And I take it Mr. Kerry has not
3 been deposed?

02:27PM

4 MR. ENGER: No, your Honor. Defendants have
5 not asked to depose him.

6 THE COURT: Mr. Haddad, does the defendant
7 want to depose Mr. Kerry if he's allowed to testify?

02:27PM

8 MR. HADDAD: Well, I mean, your Honor, I guess
9 that would be very important for us. I mean, I would
10 think they would need to have sought leave to add a
11 witness like this long after fact discovery ends and
12 after they knew our -- long after they knew our position
13 and knowing the prior art since October of 2013. I think
14 it really handicaps us weeks before the trial here. It's
15 an ambush.

02:28PM

16 THE COURT: Mr. Haddad, the reason this is
17 giving me trouble is that we are trying to achieve a
18 resolution of the case on the merits. It's important
19 that the rules be followed, but exceptions are made when
20 there are circumstances that are beyond the control of
21 either side. What I'm hearing is that it's a very close
22 time frame from when the defendants learned of the
23 importance of Mr. Kerry's testimony, when it was
24 disclosed to you in the expert report, and when they put
25 him on their trial witness list; and it sounds like the

02:28PM

02:28PM

1 prejudice to you can be cured by causing him to be
2 presented for deposition.

3 How will you be prejudiced as long as you get
4 his deposition before trial?

02:29PM

5 MR. HADDAD: And I guess after the deposition
6 we'll figure that out and we'll have to look at our
7 expert reports and see whether that needs any updating
8 and -- we're only talking about Mr. Kerry, correct, not
9 Mr. Koopman?

02:29PM

10 THE COURT: I believe that the case regarding
11 Dr. Koopman is not compelling enough, especially given
12 that he is at this point retained by plaintiff, to
13 justify his joinder in the case at this stage. And I'm
14 going to grant the motion to exclude with respect to

02:29PM

15 Dr. Koopman, but I at this point will deny the motion
16 with respect to Mr. Kerry with the stipulation that he be
17 made available promptly for deposition. And if you want
18 to file some supplemental motion after that, if you can
19 show some prejudice beyond that which is contemplated at
20 this time, then I'll give you an opportunity to make that
21 argument.

02:30PM

22 MR. HADDAD: Okay, your Honor.

23 THE COURT: All right. No. 8.

24 MR. HADDAD: Your Honor, this is related to

02:30PM

25 No. 7, your Honor. It's the private conversations

1 between Rembrandt's expert Dr. Ak1 and Dr. Koopman and
2 also Mr. Kerry. I think it's -- I think it's sort of
3 definitely tied in with the previous motion. And if
4 we're going to exclude Dr. Koopman, your Honor, I think
5 we need to exclude the conversations on which any opinion
6 that conversation was based.

02:31PM

7 THE COURT: You know, experts can routinely
8 rely upon hearsay in formulating their opinions; but
9 they're not thereby entitled to repeat that hearsay to
10 the jury. Are we talking about just preventing Dr. Ak1
11 from testifying to the jury about these conversations, or
12 are you talking about trying to prevent him from basing
13 an opinion on that?

02:31PM

14 MR. HADDAD: Well, I think it's both, your
15 Honor. He relied on Dr. Koopman for expert --
16 essentially expert testimony that Dr. Koopman did not
17 submit an expert report on. This is also not the type of
18 information that one would find in a learned treatise or
19 other type of hearsay that an expert often relies on.

02:32PM

20 This is, you know, a private conversation between two
21 people, again that we had no opportunity to examine,
22 where Dr. Koopman was interpreting an article that he was
23 an author on but when he talked about it, he was talking
24 about a former version of the article, a draft version
25 that was submitted for publication, edited, and then

02:32PM

02:32PM

1 published. We relied on the published application -- the
2 published article, your Honor.

3 So, I think any testimony on which he relies
4 on opinions of Dr. Koopman as opposed to -- unlike --
02:33PM 5 they cited to Rule 703 which really relates to facts and
6 data, that type of hearsay. That's not what Dr. Koopman
7 was. Dr. Koopman is opinion testimony, and they're
8 trying to get that in through their expert Dr. Ak1.

9 THE COURT: So, you are trying to restrict the
02:33PM 10 testimony -- or actually the opinions of Dr. Ak1 through
11 this motion?

12 MR. HADDAD: Yes, your Honor.

13 THE COURT: And are you contending that the
14 opinion is beyond the scope of Dr. Ak1's expertise?

02:33PM 15 MR. HADDAD: What I'm contending, your Honor,
16 is that he sought out the expert opinion of another
17 expert who hasn't given us an expert report -- who is a
18 paid expert, by the way, and has been retained by the
19 plaintiffs -- and we haven't seen an expert report and
02:34PM 20 it's unlike relying on facts and data.

21 THE COURT: You only get an expert report from
22 someone who is going to testify.

23 MR. HADDAD: Yes, your Honor. So, this was
24 their way around it. Get another opinion from someone
02:34PM 25 else. And it's not as if he is relying on another piece

1 of, you know -- relying on a textbook, your Honor, to
2 help him convey his opinions. He's relying on the
3 opinion of someone who said, "Well, I wrote another
4 article and it got edited and that's what was published
5 and what I meant to say was" and interpreted -- is
6 interpreting what he submitted that no one ever even saw.
7 We don't even know what it was he submitted in draft
8 form, and now he's trying to get that in through --

02:34PM

9 THE COURT: How would he get that in?

02:35PM

10 MR. HADDAD: By a conversation that we
11 don't --

12 THE COURT: Well, he -- over your objection,
13 he's not going to be allowed to testify about his
14 conversation with Dr. Koopman. That would be hearsay.

02:35PM

15 He can't introduce hearsay evidence just because he
16 relied upon it.

17 Are you saying that you don't want him to be
18 able to give the opinion that he formulated after
19 consulting with Dr. Koopman?

02:35PM

20 MR. HADDAD: I guess his own opinion where --
21 if he's interpreting the article to mean one thing and we
22 interpret the article to mean another thing, completely
23 devoid of any reference to what an author of the article
24 may have said or may not have said, I can't -- you know,

02:35PM

25 I can't control that, what he's going to interpret, if

1 it's within the scope of his report, other than what
2 he's -- that conversation. But if that opinion is based
3 on that conversation, your Honor, then that opinion has
4 to be excluded, too.

02:36PM

5 THE COURT: I don't think so. I think that an
6 expert is entitled to consult other experts and he's
7 entitled to consider matters that are inadmissible as
8 long as they're the sorts of things that experts
9 typically rely upon and certainly consulting other

02:36PM

10 experts is common. They simply can't be the mouthpiece
11 then to tell the jury what that other person said; but if
12 you challenge their opinion, then they're entitled to
13 support it by reference to whatever their sources were.

02:37PM

14 MR. HADDAD: Okay. Your Honor, then we accept
15 that if they don't -- if we keep the testimony out
16 relating to -- we're talking about Dr. Koopman right now.

02:37PM

17 THE COURT: And that -- the ruling would be
18 that over your objection the plaintiff is not permitted
19 to have Dr. Ak1 refer before the jury to what Dr. Koopman
20 told him.

21 MR. HADDAD: Okay. Fair enough, your Honor.

02:37PM

22 THE COURT: He can offer his opinions,
23 whatever they are; and then if you don't open the door by
24 challenging his basis for that opinion, then he can't
25 provide it on cross.

1 MR. HADDAD: Okay, your Honor.

2 MR. ENGER: Your Honor, I'd like to seek a
3 brief point of clarification, if I may.

4 THE COURT: Go ahead.

02:38PM

5 MR. ENGER: So, what Dr. Ak1 did with
6 Dr. Koopman is exactly the same thing that Samsung's
7 expert, Dr. Goodman, did with Mr. O'Hara. He relied only
8 upon a conversation that he had with Mr. O'Hara to form
9 his opinion on public availability.

02:38PM

10 So, if you're going to make a rule that says
11 you can't get into the substance of that conversation and
12 the foundation of what he relied upon because that's
13 hearsay for our expert Dr. Ak1, the same rule should
14 apply for Samsung's expert Dr. Goodman with respect to
15 O'Hara.

02:38PM

16 THE COURT: I didn't make the rule. Believe
17 it or not, it's in the Federal Rules of Evidence. I'm
18 just applying it when I get objections. So, if you have
19 an objection to what their expert is saying, you've got
20 to raise it. And all I'm doing is ruling on their
21 objection to your expert. If you --

02:38PM

22 MR. ENGER: I just want to make sure we're
23 playing by the same set of rules, your Honor, because
24 what we're doing with Dr. Ak1 is exactly the same thing
25 that Samsung is doing with Dr. Goodman. They're both

02:39PM

1 relying upon another expert to provide them information
2 about, you know, prior art. And if you're going to say
3 that our expert Dr. Akl can't get into the substance, he
4 can say he relied upon a conversation he had with Koopman
5 but not the substance of that, then the same should go
6 for Samsung's expert Dr. Goodman. He should be able to
7 say he relied upon something Mr. O'Hara told him but not
8 get into the substance of what Mr. O'Hara told him.

02:39PM

9 THE COURT: And if you present that objection,
10 it will get the same ruling. We're going to apply the
11 rules the same way. But I don't have that objection
12 before me right now.

02:39PM

13 MR. ENGER: Thank you, your Honor.

14 MR. HADDAD: Your Honor, there's a reason you
15 don't have that objection and that's because we are
16 calling Mr. O'Hara live and, so, there is no hearsay
17 issue with respect to Mr. O'Hara on whom Dr. Goodman will
18 rely.

02:39PM

19 THE COURT: Okay. Well, then, I won't be
20 looking forward to that objection.

02:39PM

21 MR. HADDAD: Okay.

22 THE COURT: So, No. 8 is granted to the extent
23 that Dr. Akl will not be permitted to repeat what
24 Dr. Koopman told him but he can rely upon it as a basis
25 for his opinion.

02:40PM

1 MR. SMITH: Your Honor, if I could request a
2 clarification.

3 THE COURT: Mr. Smith.

02:40PM

4 MR. SMITH: Previously you had said Dr. Ak1
5 could not refer to what Mr. Koopman told him and I
6 believe what the court just said was could not repeat and
7 I wanted to make sure I was clear on what the court's
8 ruling was.

02:40PM

9 THE COURT: I think that you're right. I
10 meant refer to it. He can rely upon it, but he can't
11 refer to it.

12 MR. SMITH: Okay.

13 THE COURT: And I would --

14 MR. ALAVI: Your Honor?

02:41PM

15 THE COURT: Yes.

02:41PM

16 MR. ALAVI: So I have a clarification, can the
17 expert describe what he did, interviewed Dr. Koopman?
18 Doesn't say what was said, doesn't refer to what was
19 said, but just lays out the basis for his opinion. Which
20 he has to do for the record on appeal anyway. You can't
21 just stand up and give opinions without disclosing the
22 basis for it.

23 THE COURT: Well --

02:41PM

24 MR. ALAVI: We don't want to run afoul of the
25 ruling. So, I just wanted to make sure he can do that

1 without referring to or describing what was said to him.

2 MR. SMITH: Which would be making him the
3 mouthpiece of the witness, as the court referred to,
4 *Factory Mutual Insurance versus Alon*, Fifth Circuit,
5 705 F.3d 518.

02:42PM

6 MR. ALAVI: It's his own opinion. He's
7 saying, "What did you do to develop your opinion?"

8 "I looked at this document. I looked at this
9 document. I interviewed the author. I did X and Y. I
10 relied on my expertise."

02:42PM

11 "And what's your opinion?"

12 "My opinion is."

13 That's not a mouthpiece because he's not
14 repeating the hearsay conversation. He's giving his
15 opinion, and he's letting the jury -- and more
16 importantly the appellate court -- know what the basis
17 for his opinion is so there's a full record that he has a
18 basis for rendering the opinion that he renders.

02:42PM

19 THE COURT: If -- what I don't want is for you
20 to connect those two things closely together. I don't
21 think there's anything objectionable to Dr. Ak1
22 mentioning that he talked to Dr. Koopman, along with
23 everything else he did; but if he says that he talked
24 with Dr. Koopman and "In my opinion, here it is," I'll
25 consider that to be a violation of it and, you know, I

02:42PM

02:43PM

1 will let Judge Gilstrap know that and he will have to
2 enforce that line. But as long as you're simply
3 mentioning talking to Dr. Koopman in connection with all
4 the other work he did and not in connection with this one
5 opinion, then I don't believe you will have violated that
6 rule.

02:43PM

7 MR. ALAVI: Thank you for the clarification,
8 your Honor.

9 THE COURT: All right.

02:44PM

10 MR. SMITH: Thank you, your Honor.

11 THE COURT: Thank you.

12 MR. HADDAD: Your Honor, there's the -- we
13 also moved on this motion with respect to Mr. Kerry, a
14 private conversation with Mr. Kerry.

02:44PM

15 THE COURT: And the same ruling would apply to
16 that. Obviously if Mr. Kerry testifies at trial, then
17 there's nothing wrong with Dr. Ak1 alluding to that
18 testimony in connection with his opinion; but if Dr. --
19 or if Mr. Kerry has not testified at the time of

02:44PM

20 Dr. Ak1's testimony, then he should not make any
21 statement that conveys Dr. -- or Mr. Kerry's statements
22 to the jury. Does that make sense?

23 MR. HADDAD: Yes, your Honor.

02:46PM

24 THE COURT: Okay. All right. That takes us
25 to No. 9.

1 MR. SHERWOOD: Your Honor, we've withdrawn
2 No. 9.

3 THE COURT: Okay. That's good.
4 What's the disposition of No. 10?

02:46PM

5 MR. ALAVI: Your Honor, I'll let the
6 defendants confirm this; but I think No. 10 was withdrawn
7 as -- in the motion itself.

8 THE COURT: All right.

02:46PM

9 MR. ALAVI: I think it's an agreed -- so, let
10 me -- I'll let Mr. Haddad confirm this. I think we
11 agreed to No. 10; so, there's no briefing on it. We just
12 need to submit an agreed limine.

13 THE COURT: All right. I see in the table of
14 contents it refers to it has withdrawn. Okay.

02:47PM

15 MR. ALAVI: But to be clear, because I don't
16 want to misrepresent anything to the court, it's
17 withdrawn because it's agreed to; so, the parties need to
18 submit agreed language to the court on the doctrine of
19 equivalents. It's going to be an agreed motion in
20 limine.

02:47PM

21 THE COURT: Okay. And what is it going to
22 agree to do?

23 MR. ALAVI: That Rembrandt will not argue
24 doctrine of equivalents.

02:47PM

25 THE COURT: Okay.

1 MR. ALAVI: We'll put together some language
2 that both sides agree to and submit it to the court.
3 Sorry for the -- it's a little confusing but...

02:48PM

4 THE COURT: All right. And No. 11 is one that
5 I would expect to grant.

6 MR. SHERWOOD: Your Honor, I take it I don't
7 need to argue.

8 THE COURT: Well, not at this point. You're
9 ahead.

02:48PM

10 MR. SHERWOOD: Okay. I'll sit down, then.

11 MR. HEIM: Your Honor, Mike Heim for
12 Rembrandt.

13 THE COURT: Yes, Mr. Heim.

02:48PM

14 MR. HEIM: Couple of things to note. First of
15 all, as we said earlier, there have been ten IPRs filed
16 in this case; and those IPRs, the PT0 has reached a
17 decision with respect to the asserted claims in this
18 case. The decisions in those IPRs are final decisions
19 that are not appealable pursuant to 35 U.S.C., 314(d).

02:48PM

20 So, we have, you know, a unique situation here where
21 Samsung, as the party who filed the IPRs, presented
22 argument as to these trial claims that is identical to
23 the arguments that they are making in this case. It's
24 the same references; it's the same arguments. They're

02:49PM

25 submitting the same evidence. They're submitting the

1 declarations from their expert, declarations from
2 Mr. O'Hara that we just talked about.

02:49PM

3 The Patent and Trademark Office, after
4 receiving those ten different IPRs with respect to the
5 claims that we are asserting, has denied those IPRs; and
6 the Patent and Trademark Office gave a very lengthy
7 explanation of the two main prior art references that
8 defendants were relying on.

02:49PM

9 The first is a draft WiFi standard and the
10 Patent and Trademark Office ruled that that standard was
11 not prior art; and as a result, it did not institute the
12 IPR as to the IPRs that relied on that draft standard.
13 That is a final decision. The defendants requested
14 reconsideration. That was denied.

02:50PM

15 And, so, we have a situation first, as to the
16 first piece of prior art, where they have fired their
17 guns, they've gone off to IPRs, they filed all these
18 proceedings, and they have lost. It is part of the
19 prosecution history in this case. It is a final
20 decision. It is the exact argument by the exact party in
21 this case.

02:50PM

02:50PM

22 They are going to get up at trial and they're
23 going to argue that same reference again and they're even
24 going to say that the Patent and Trademark Office hasn't
25 looked at it because they're going to refer to the

02:50PM

1 original prosecution, which is just blatantly wrong. We
2 have an extensive file history, 15-page opinion from the
3 Patent and Trademark Office, explaining exactly why the
4 draft standard is not prior art. That's the first piece
5 of prior art.

02:51PM

6 The second piece of prior art is a patent by
7 the name of "Boer." They filed additional IPRs based on
8 Boer. With respect to those IPRs, the Patent and
9 Trademark Office refused to institute proceedings as to
10 the trial claims based on Boer, again giving extensive
11 rationale of why they were doing that.

02:51PM

12 So, it's part of the record. It's the
13 argument made by this very party. Same arguments, same
14 evidence. It has been denied by the Patent and Trademark
15 Office; and, your Honor, the jury is entitled to hear
16 that evidence. It says if it was an *ex parte* or
17 *inter partes* reexamination, that is final. And which the
18 defendants have made all the arguments and they've lost
19 and they want to start anew in the litigation.

02:51PM

20 So, for that reason, your Honor -- and there's
21 been fairly extensive briefly on this -- we think that
22 this is a unique situation because of the fact that it's
23 the same party, Samsung, making the same arguments with
24 the same evidence.

02:51PM

25 THE COURT: Mr. Heim, you know, up until I

02:52PM

1 guess a couple hours ago, I was not aware that the
2 plaintiff was no longer asserting the claims as to which
3 the IPR was instituted; and the situation there is that
4 the court has in the past simply kept out all the
5 references on both sides. What you're presenting is a
6 little different situation here.

02:52PM

7 MR. HEIM: Yes, your Honor. In the *Droplets*
8 case, you have a situation where both sides were
9 selectively trying to keep things out of reexamination
10 for covered business method. That's not the case here.
11 We have a final decision on the trial claims.

02:52PM

12 THE COURT: Well, I can certainly understand
13 the concern that if the defendants are going to argue to
14 the jury that the PTO never had an opportunity to examine
15 that art, that that would raise a serious question in
16 view of the fact that it has been presented to the PTAB.

02:53PM

17 MR. HEIM: And it goes beyond that, your
18 Honor. What you've heard earlier today is they want to
19 get the record out and say they've given up on these
20 claims or there's all this history, including disclaimers
21 that occurred in the IPRs. So, what they want to do is
22 give a completely one-sided picture of what has gone on
23 in these IPRs when, in fact, the most dispositive, the
24 most clear picture here is that they made their
25 arguments, they took their shot, and they lost.

02:53PM

1 THE COURT: There's still proceedings going on
2 in the PTAB in connection with this IPR on the claims
3 where it was not instituted. Tell me what your view of
4 those is.

02:54PM

5 MR. HEIM: Yes. Let me just break it up for a
6 second, your Honor.

02:54PM

7 First of all, we have the IPR proceedings that
8 are based primarily on the WiFi standard. As far as I
9 understand it, those are done. You know, that's a
10 situation where they denied institution of the IPR.
11 There has been a request for reconsideration. That has
12 been denied. I don't believe that's an appealable
13 decision. So, we're done.

02:54PM

14 So, then there's the other IPRs in which
15 they've used the Boer reference. And in that case, some
16 of the claims, the trial claims, they did not institute
17 the IPR; and then there are other claims on which they
18 did institute the IPR. The only thing of course that we
19 would use is the PTO's decision with respect to the
20 failure to institute as to the trial claims.

02:54PM

21 Now, they have filed new IPRs -- and we're not
22 going to get into those -- where they're trying to join,
23 trying to make other arguments. But with respect to the
24 final decision that occurred with respect to the Boer
25 reference on the trial claims, your Honor, we believe

02:55PM

1 that's final, that's done.

2 THE COURT: So, which claims -- was that Boer
3 reference asserted against all of the claims that you're
4 currently asserting?

02:55PM

5 MR. HEIM: Yes, your Honor, it was. And other
6 claims as well which the PTO instituted. But with
7 respect in particular to the trial claims, they
8 petitioned for an IPR in those claims and that petition
9 was denied and the IPR was not instituted on those

02:55PM

10 claims, '580 claims 2, 19, 52, 59 and '228 patent
11 claim 21.

12 And let me just raise one other point, your
13 Honor. In this case, of course, the invalidity case,
14 they're going to have to prove their case by clear and
15 convincing evidence. They face a lesser standard at the
16 Patent and Trademark Office. It's a reasonably
17 likelihood. Some have compared to a substantial
18 evidence -- a preponderance of the evidence -- I'm
19 sorry -- preponderance of the evidence standard. They
20 lost on that. On a lesser standard at the IPR, they
21 lost.

02:56PM

22 At trial they have a greater standard. They
23 have clear and convincing evidence, and for that
24 additional reason we believe that it's relevant for the
25 jury to hear this.

02:56PM

1 THE COURT: Are there other references that
2 are being asserted besides the Boer reference?

3 MR. HEIM: Your Honor, so, there was the draft
4 WiFi standard which the Patent and Trademark Office found
02:56PM 5 was not prior art. That's a set of their IPRs. The
6 other set is based primarily on Boer. So, that's the
7 general focus of the IPR. There are some secondary
8 references or prior art that's mentioned as secondary,
9 but it's identical to what Dr. Goodman is doing in this
02:57PM 10 case. And they submitted a declaration from Dr. Goodman
11 that lays out virtually the same arguments, if not the
12 identical arguments.

13 THE COURT: And is there other prior art
14 that's being asserted in support of the invalidity case
02:57PM 15 in court?

16 MR. HEIM: Your Honor, there are two
17 additional -- one or two, depending on how you count --
18 two additional pieces of prior art that they are
19 asserting; and, your Honor, their basis of asserting
02:57PM 20 those -- and there is actually a motion to strike that
21 because it was raised late. But those additional pieces
22 of prior art are based exclusively on their argument that
23 these patents are not entitled to their priority date.
24 It is essentially a priority date attack that they're
02:57PM 25 making with respect to these other two references.

1 With respect to the substance, the 102/103
2 substance, and giving effect to the priority date, those
3 are the only two references, the same two references that
4 were the subject of the IPRs.

02:58PM

5 THE COURT: All right. Thank you, Mr. Heim.

6 MR. HEIM: Thank you, your Honor.

7 MR. SHERWOOD: Your Honor, I take it you want
8 to hear argument now.

9 THE COURT: Yes, I do.

02:58PM

10 MR. SHERWOOD: So, first of all, your Honor, I
11 think -- and this I suspect might have been the court's
12 initial reaction to this issue. This brings us into a
13 whole set of collateral inquiries about what an IPR is,
14 what the standards are, who makes the decision, what the
15 procedures are, what the PTAB follows with respect not to
16 the merits of the issues but to whether an IPR ought to
17 be instituted; and that is actually on, as the court well
18 knows, a submission that is made by the petitioner to the
19 PTAB. So, there are a variety of issues here that I

02:58PM

20 think are collateral to the issues that the jury is going
21 to decide; and as we have indicated, we think it's --
22 particularly in a timed trial like this, it's a highly
23 prejudicial thing to be forced to spend time with that.

02:59PM

24 I also want to point out that specifically
25 with respect to the Boer reference, you know, what's been

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02:59PM

1 going on here is that the IPRs have had a significant
2 amount of success here in the sense that the number of
3 claims that are not subject to trial has -- you know, the
4 number of claims that are being tried at the PTAB, I
5 should say, is significant. They've disclaimed. They've
6 dropped the ones. I mean, so, we get into a whole issue
7 of saying, "Well, we would want to tell the jury all
8 about that, too," to explain to the jury all of the
9 navigation that is going off by the plaintiff to try to
10 avoid what is going on in PTAB. So, that's yet another
11 aspect of this kind of collateral burdensome thing that
12 if this wasn't granted, you know, the jury would be
13 subjected to.

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03:00PM

14 Second of all, as the court has pointed out,
15 all of these claims are subject to pending proceedings
16 before the PTAB. And to me, this takes us right back to
17 the argument that I made earlier today with respect to
18 the motion to stay. The sensible, streamlined thing
19 would be to say, okay, let's actually let the PTAB finish

03:00PM

20 its process before we take any of this up. And I
21 understand the court has decided not to do that. The
22 plaintiff has opposed a stay; and, yet, now they want to
23 talk about PTAB proceedings that everybody understands
24 are not complete and that Samsung is, in fact, still

03:01PM

25 exercising its rights with respect to those.

1 THE COURT: Well, tell me about the status
2 with respect to the two references, the Boer reference
3 and the draft WiFi standard.

4 MR. SHERWOOD: Well, so, your Honor, with
03:01PM 5 respect to the draft WiFi standard, to take that first,
6 if the court looks at the decisions that Rembrandt
7 attached to its opposition, those decisions are simply
8 focused on one question; and that is whether that draft
9 standard qualified as a printed publication. And that's
03:01PM 10 not a decision on anything more than that. It's not a
11 decision on anticipation; it's not a decision on
12 obviousness. It's a decision on whether the petition as
13 presented to the PTAB provided sufficient evidence in
14 view of the PTAB, the three judges, as to whether it was
03:01PM 15 publicly accessible. And, you know, there again, your
16 Honor, I think we just get into a collateral, you know,
17 prejudicial process and debating and litigating and
18 arguing that.

19 With respect to the Boer reference, that is
03:02PM 20 the reference upon which the PTAB did institute trial
21 with respect to many of these claims. That is obviously
22 one of the two primary references that we're asserting
23 here that -- with the 802.11 standard. And we have
24 various combinations that are in our expert's report.
03:02PM 25 They've taken depositions on that; and, you know, that's

1 all part of the record of the case at this point.

2 There is not a complete identity with respect
3 to the issues and the arguments that were presented to
4 the PTAB and those that are going to be presented to the
5 jury. Just by way of one example, we have a piece of
6 prior art that we refer to as a "press release" that's
7 actually issued contemporaneous -- or more or less
8 contemporaneous, I should say, with the Boer reference.
9 So, that is a combination that was not presented to the
10 PTAB that is a part of our case here.

11 Have I answered your question about the two
12 references, your Honor? I'm not sure what else you
13 wanted to know about them.

14 THE COURT: Are you going to make an argument
15 to the jury that the PT0 did not look at one of these
16 references?

17 MR. SHERWOOD: Well, your Honor, that's an
18 interesting question. I do appreciate the point with
19 respect to saying that the PT0 never saw, for example,
20 the draft standard, when we know there obviously was an
21 IPR filed with respect to that; but again I go back to
22 the point that that was not a decision on the merits with
23 respect to any 102 or 103 issue.

24 As Mr. Heim said, that decision is not
25 appealable. We have no way to challenge the accuracy of

1 that other than to do what we've done, which is to file
2 new IPRs.

3 Now, the new IPRs have been filed on Boer, not
4 on the 802.11 standard, just to be clear on that point,
03:04PM 5 your Honor.

6 THE COURT: Are you familiar with any
7 jurisprudence dealing with the admissibility of decisions
8 not to institute IPRs?

9 MR. SHERWOOD: Well, your Honor, we have cited
03:04PM 10 a couple of cases in our brief, specifically the *Droplets*
11 case and the *Interdigital* case. The *Droplets* case, as I
12 understand it, does not contain any analysis, so to
13 speak, of this issue. The court is smiling. I think the
14 court may be more -- I'm sure is more aware of it than I
03:05PM 15 am.

16 THE COURT: I did know what the analysis was.

17 MR. SHERWOOD: It's probably what you were
18 thinking when we took this one up.

19 And as I said, we have cited the *Interdigital*
03:05PM 20 case; and I think the analysis there is essentially what
21 I'm saying, which is that we're going to go off on a
22 frolic here talking at length about the IPR process and
23 issues and what the standard is. I mean, Mr. Heim made
24 reference to the standard. The standard is a reasonable
03:05PM 25 likelihood that the petitioner would prevail with respect

1 to at least one of the claims challenged in the petition.
2 And that is a different standard. I agree, your Honor.
3 But that is not a resolution, as I said before, with
4 respect to anticipation or obviousness.

03:05PM

5 And what will happen here, though, is that the
6 jury will get confused about what the PTAB actually did
7 decide with respect to 802.11 in particular, the one that
8 they attached to their papers, and what the issue is
9 that's before it.

03:06PM

10 Now, we're going to have testimony; we're
11 going to have evidence about that precise issue of public
12 accessibility. So, that's all going to be before the
13 court; and it's going to be before the court in a much
14 more robust and complete way than it was ever before the
15 PTAB.

03:06PM

16 THE COURT: All right.

17 MR. SHERWOOD: Your Honor, I mean, I just
18 would add I think this is a really highly prejudicial
19 thing to allow this to come in and for the jury to hear
20 this. I think the court can understand that.

03:06PM

21 THE COURT: I think it is evidence that would
22 carry significant weight with the jury and that's the
23 reason why I think it's important to get it right and I
24 think because this -- the posture of this has changed

03:06PM

25 since I looked at it yesterday, now that there has been a

03:07PM

1 change in the asserted claims, I want to look at the
2 *Interdigital* case I guess and, anyway, give it some more
3 thought. But I'm -- I am concerned that even if the
4 decision is not to admit this, that it would open the
5 door if the defendant makes an argument to the jury that
6 it's not -- that the reference has not been seen by the
7 PT0. But in any event, I'll carry this one at this time;
8 and I appreciate your argument.

03:07PM

9 MR. SHERWOOD: Thank you, your Honor.
10 That might be our last one -- oh, is there one
11 more? Okay.

12 THE COURT: I think that No. 12 has been
13 granted by agreement, is my understanding.

03:08PM

14 MS. BIANROSA: Yes, your Honor. We're on
15 Motion in Limine No. 13, to exclude any mention of
16 spoliation or a destruction of documents.

03:08PM

17 Rembrandt has been using the term "destroyed"
18 with respect to these PICs documents but they don't have
19 any evidence that any documents were in fact destroyed
20 and that type of accusation in front of the jury is
21 highly prejudicial. Rembrandt can't point to any
22 documents or testimony that it got during discovery of
23 Samsung's destruction of any documents, and exploration
24 into that area again at trial is not going to prove to be
25 any more fruitful and will only serve to be prejudicial

03:08PM

1 and color the jury with inappropriate accusations of
2 Samsung.

3 And just to go into what those PICs documents
4 are, some of those PICs documents may never have even
03:09PM 5 been created for certain products. Where the PICs
6 documents exist, Rembrandt has them. And there are a lot
7 of reasons why some PICs documents may not exist. Like,
8 for example, they may rely on an earlier version of
9 certain products or they may rely on the Bluetooth chip
03:09PM 10 vendor certification of Bluetooth and in those cases
11 there wouldn't be any PICs documents.

12 But Samsung went to six different companies in
13 Korea to get the PICs documents that are produced, and it
14 produced what we received from the vendors. Any
03:09PM 15 allegation that there was a contractual obligation to a
16 third party, it's really irrelevant here to the issue of
17 spoliation. Samsung did in fact comply with its
18 contractual obligations and its vendors that do the
19 testing maintain those testing records and those are the
03:10PM 20 documents that we produced.

21 In addition, spoliation doesn't exist here
22 because the obligation to preserve those documents only
23 arises at a time when the party knows that there was a
24 claim against it -- so, here the March, 2013,
03:10PM 25 complaint -- and Rembrandt doesn't have any evidence of

1 destruction and can't connect any of its claims to a time
2 when Samsung knew that it had an obligation to preserve.

3 Rembrandt actually examined a Samsung witness
4 on this very issue, Mr. Kim; and he said that if Samsung
03:10PM 5 ever heard that their Bluetooth certification companies
6 destroyed documents, Samsung in fact would never use that
7 company again.

8 And Rembrandt cites cases in its opposition to
9 this motion in limine. Rembrandt's own cases state that
03:11PM 10 for an adverse inference instruction based on spoliation,
11 the proponent must establish that the evidence was
12 destroyed and that it was destroyed with a culpable state
13 of mind. And Rembrandt hasn't shown any of those here,
14 your Honor. There's no evidence of destruction, and
03:11PM 15 there's certainly no evidence that goes to a state of
16 mind.

17 THE COURT: Well, you are seeking to prevent
18 them from offering evidence on it because you don't
19 believe they have enough evidence.

03:11PM 20 MS. BIANROSA: We don't believe there's any
21 evidence, your Honor. We are trying to exclude any
22 mention or argument even as to spoliation because it
23 would be highly prejudicial in front of the jury.

24 THE COURT: All right. Let me hear from the
03:12PM 25 plaintiff.

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1 MR. ENGER: Your Honor, this case is all about
2 Bluetooth and how Samsung's products implement Bluetooth.
3 So, it should come as no surprise to Samsung that one of
4 the most important pieces of evidence in this case would
5 be the testing data that Samsung generates as part of
6 confirming that its products adhere to Bluetooth; these
7 protocol implementation conformance statements, or PICs,
8 which Samsung fills out based upon that testing data that
9 explains how its products implement Bluetooth; and,
10 three, this declaration of compliance that Samsung fills
11 out where Samsung certifies that it adheres to the
12 Bluetooth specification and promises to keep all this
13 testing data, all these PICs in a, quote/unquote,
14 compliance folder that it maintains at an address, which
15 was put down as Samsung's own address.

16 Samsung doesn't dispute that it doesn't have
17 these compliance folders with the testing data, the PICs,
18 and the declarations of compliance for about half of its
19 products. This is not only a violation of the court's
20 discovery obligations but it's also a violation of the
21 Bluetooth membership agreement.

22 You heard argument that we didn't have any
23 evidence of destruction. That's not true. I deposed
24 Samsung's corporate representative, Jun Hak Lim, at
25 length about this issue; and he testified that despite

03:13PM

1 being obligated to maintain the compliance folders and
2 despite telling the Bluetooth SIG that it maintained the
3 compliance folders at its corporate headquarters, at the
4 address of Samsung's corporate headquarters, that Samsung
5 or its -- what Samsung actually did was delegate that
6 third-party testing data to the third-party test labs.

03:13PM

7 And then when it became apparent that the compliance
8 folders were important to this issue, so much so that
9 Rembrandt had to file a motion to compel, Samsung tried
10 to get these compliance folders from the test labs but
11 they could not get them. This strongly suggests that
12 they were destroyed.

03:14PM

13 Samsung's corporate representative on this
14 topic did virtually no investigation. And that's why
15 they claim that we don't have any discovery on this, is
16 because they refused to educate their corporate
17 representative on how they were destroyed.

03:14PM

18 At the end of the day, your Honor, the jury
19 should be permitted to hear evidence related to Samsung's
20 document retention practices and decide whether and to
21 what extent relevant evidence has been lost in this case
22 due to those practices.

03:14PM

23 THE COURT: All right. Thank you, Mr. Enger.

24 MS. BIANROSA: Your Honor, this kind of
25 prejudicial language is really what we are trying to

1 avoid in front of the jury. Mentioning that Samsung
2 refused to instruct its witness on how it destroyed
3 documents presupposes the fact that there was any
4 destruction to begin with.

03:14PM

5 Samsung is not going to allege that Rembrandt
6 can't prove infringement because they don't have the
7 Bluetooth PICs documents for certain products. And, in
8 fact, Samsung admitted that its accused products comply
9 with the Bluetooth standard and the PICs documents would
10 only confirm that and add nothing else to Rembrandt's
11 case.

03:15PM

12 THE COURT: Mr. Enger, tell me how these
13 documents that you're -- it's a worthwhile issue. If
14 you're going to be arguing that these documents should
15 have been presented, what would they have added to your
16 case?

03:15PM

17 MR. ENGER: Well, your Honor, the compliance
18 folders for each one of these products is a stack of
19 paper maybe 8 inches tall. There's a lot of testing data
20 in there, there's these PICs, and there's the declaration
21 of compliance. What we don't have is the testing data
22 and the declaration of compliance. That information you
23 cannot get from the Bluetooth SIG's website. The only
24 place to get it was from Samsung. Those have been
25 destroyed. We don't have those; and that's crucial

03:15PM

03:15PM

1 evidence that we could use to prove up our infringement
2 case, your Honor.

3 THE COURT: Tell me how.

03:16PM

4 MR. ENGER: Well, they show exactly how the
5 products implement the Bluetooth specification. They
6 show exactly that Samsung declares compliance with that
7 specification. They show exactly, you know, the manner
8 in which Samsung implements Bluetooth and all the
9 different functionality that their products have that are
10 Bluetooth related.

03:16PM

11 Plus, your Honor, as I mentioned, there was,
12 you know, 8 inches of paper per compliance folder per
13 product. You know, who knows what we might have found in
14 there. That's entirely why this issue is important and
15 why we're entitled to this adverse inference instruction.

03:16PM

16 THE COURT: Well, whether or not you get an
17 adverse inference instruction is something that would be
18 determined at the end of the evidence. So, I don't see
19 that as the issue on this motion. This is simply whether
20 or not you can present to the jury the evidence about
21 these documents.

03:17PM

22 Ms. BianRosa has argued that the fact that
23 Samsung stipulates that it complied with the Bluetooth
24 standard lessens the importance of this. What do you say
25 to that?

03:17PM

1 MR. ENGER: I would agree it lessens the blow;
2 but it doesn't eliminate it, your Honor. Who knows what
3 we would have found in those big compliance folders. We
4 don't have the testing data to be able to show the jury
03:17PM 5 exactly what Dr. Morrow considered for infringement, and
6 we don't have the declaration of compliance which
7 explains and certifies the compliance with the Bluetooth
8 specification.

9 THE COURT: All right. Well, I'm --

03:17PM 10 MS. BIANROSA: Your Honor, if I could just
11 add. From all of the PICs documents that were produced,
12 Rembrandt still hasn't articulated here what was so
13 important in those 8 inches of documents that it would
14 use from the PICs documents that it is alleging are
03:18PM 15 missing now.

16 MR. ENGER: With all due respect, that's not
17 true, your Honor. I said we would use the testing data
18 to show exactly how the products comply with the
19 Bluetooth specification.

03:18PM 20 THE COURT: Well, I'm going to grant this
21 motion to a limited extent; and that is that I'm going to
22 direct that you not make any argument to the jury in your
23 voir dire or opening about spoliation. But I'll allow
24 you to explore whether or not the defendant has

03:18PM 25 maintained and produced the records that you believe that

1 they're required to regarding Bluetooth, and you can
2 address that matter with the court before your closing
3 arguments as to whether or not there's a basis to argue
4 spoliation to the jury at that time.

03:19PM

5 MR. ENGER: So, to be very clear, we can
6 present evidence showing that there was destruction but
7 we cannot ask for an adverse inference until the very
8 end.

03:19PM

9 THE COURT: Well, you can present evidence as
10 to whether or not the documents exist. "Destruction" is
11 a conclusory term that I think needs to not be used until
12 you've got the evidence in about it. Does that make
13 sense?

03:19PM

14 MR. ENGER: So, to be clear, all this evidence
15 will come from a deposition of a Samsung Korean witness
16 which we can't -- they're not bringing the Korean witness
17 to trial, and we don't have time to go back and take
18 another deposition. So, does it make sense whenever we
19 do the deposition designations to go through pages 100
20 through 108 of Lim's deposition and get some more
21 guidance on whether or not we can use that particular
22 evidence at the time?

03:19PM

03:20PM

23 THE COURT: If there's objections to it,
24 certainly we'll go through it. But what I'm -- I'm
25 simply at this point granting this motion as to argument,

1 not as to evidence.

2 MR. ENGER: Understood.

3 THE COURT: Okay. All right.

4 And I think we've already dealt with No. 14.

03:20PM

5 MR. SHERWOOD: That's correct, your Honor.

6 THE COURT: All right. What other issues
7 besides the -- I know there's some pending motions that
8 need to be addressed by the court.

03:21PM

9 Are there other issues that either side wants
10 to present today?

03:21PM

11 MR. ALAVI: Your Honor, I think, taking
12 guidance from the court, we'll defer the exhibits and the
13 depo designations until February 2nd so that we can have
14 another opportunity to meet and confer and see if we can
15 reduce the scope of objections. So, from the plaintiff's
16 perspective, we have nothing further -- oh, I'm sorry.
17 Mr. Ward has something.

03:21PM

18 MR. WARD: One thing, your Honor. And
19 Mr. Smith and I talked before lunch about Samsung
20 potentially limiting its prior art references like we've
21 limited our claims. I didn't know if the court had a
22 practice where if we don't reach an agreement, the court
23 enters an order. Obviously we're trying to get things
24 streamlined as we get down for trial. We haven't had a
25 chance to discuss that. So, I know -- maybe we can take

03:21PM

1 a break and then come back and hopefully articulate some
2 type of agreement on the record. If not, maybe get some
3 guidance from your Honor.

03:22PM

4 MR. SMITH: Your Honor, I think you just heard
5 what our invalidity argument is, how limited the
6 references are in our expert's report. It's down to --
7 we received a request yesterday to try and cut it down
8 from I think 40 that were in our '282. It is cut down to
9 I think somewhere -- 10 or 12 in the expert's report.

03:22PM

10 But it's what you've just heard of. We think it's been
11 cut down sufficiently. It may or may not be cut down
12 further. We don't know that and I can't represent
13 whether it will or won't, but at this point I don't know
14 that we're -- that there are any additional changes that
15 we're going to make to it.

03:22PM

16 THE COURT: All right. Well, I'd ask you just
17 to finish out this conversation between the two sides.

03:22PM

18 And then, Mr. Ward, if you've got something
19 that you want to seek from the court, you can present it
20 at that time.

21 MR. WARD: Sure.

03:23PM

22 THE COURT: With respect to the exhibits and
23 the deposition designations, I would like to get updated
24 lists before the February 2 hearing. I want to -- I
25 guess, frankly, if you'll just bring them to the hearing.

03:23PM

1 I just want to have an up-to-date list to go from at that
2 time. It won't do me any good to have them in advance;
3 but if I don't have them at the hearing, it will be very
4 hard for us to make a record of what the decisions are as
5 we go through.

03:23PM

6 So, if you could just, each side, bring an
7 up-to-date list of their exhibit objections and their
8 deposition designation objections, we'll go from there on
9 the 2nd.

10 And I --

11 MR. JENNER: I beg your pardon, your Honor.

12 Did you set a time for February 2nd?

03:24PM

13 THE COURT: I don't know that I did. Is there
14 a preference? I know some of you are coming in, if it
15 helps you to do it in the afternoon. It doesn't really
16 matter to me whether we start at 1:00 or at 9:00.

17 MR. ANAIPAKOS: Your Honor, I will note for
18 the record the Super Bowl is the night preceding.

03:24PM

19 MR. JENNER: My wife would be very happy if I
20 got on an airplane early Monday morning instead of
21 Sunday.

22 THE COURT: What time would accommodate your
23 wife?

03:24PM

24 MR. JENNER: That's always difficult and
25 dangerous. Whatever your Honor considers the afternoon

1 start, 1:00 o'clock, 1:30, I think we can get here by
2 then.

3 THE COURT: Why don't we say 1:30, and you can
4 tell Mrs. Jenner we did that just for her.

03:24PM

5 MR. JENNER: I will make a point of that.

6 THE COURT: All right. And if the Saints were
7 in the Super Bowl, we'd be starting later; but they're
8 not.

03:24PM

9 All right. Well, then, is there anything
10 further that either side needs?

11 Mr. Smith?

12 MR. SMITH: Nothing from the defendants, your
13 Honor.

14 THE COURT: Mr. Ward?

03:24PM

15 MR. WARD: Nothing from the plaintiff.

16 THE COURT: All right. Then we're in recess.

17 (Proceedings adjourned, 3:25 p.m.)

18

19 COURT REPORTER'S CERTIFICATION

20 I HEREBY CERTIFY THAT ON THIS DATE,
21 JANUARY 22, 2015, THE FOREGOING IS A CORRECT TRANSCRIPT
22 FROM THE RECORD OF PROCEEDINGS.

23

24

25

/s/
TONYA JACKSON, RPR-CRR